

Chapter 7

Hans Kelsen and Practical Reason

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Abstract The critique of practical reason, in all its possible forms, has a far more important and decisive role in Kelsen's thought than the rejection of Natural law doctrine. Admitting that a practical use of reason is legitimate, namely, that there is a possible connection between intellect and will, would mean destroying the whole foundation of the scientific undertaking of the Pure Theory of law and its conception of the legal norm, which is its central aspect. By depriving practical reason of all foundation, any reference to agency and practical deliberation is excluded from Kelsen's theory of law. Consequently, the Ought loses all capacity of attraction and motivation of human action, rendering Kelsen's normativity inert. This chapter intends to show that Kelsen's enterprise of purifying legal science only attains its fulfilment when the practical dimension of reason itself is eradicated, along with the sociological or political or ideological aspects of law; and in this way the Pure Theory of law is forced to forgo some of its distinctive features, as is evident in Kelsen's final works; and that the demise of practical reason strongly destabilizes the Pure Theory of law itself.

7.1 Introduction

It is arguable that it is no longer possible to offer or develop any entirely new insights into or reflections upon Kelsen's thought. Rather, the interpretative parameters have already been firmly established, leaving the sole task to be that of drawing up the balance sheet: asking what is alive and what is dead in the Pure Theory of law, and reflecting on its positive and negative legacy (e.g., Duarte d'Almeida et al. 2013). From this perspective, it is possible to state immediately that, regarding practical reason, the balance is entirely negative. The developmental paths and tendencies of contemporary legal theory and philosophy all proceed in the opposite direction to that of Kelsen.¹

¹I refer in particular to conceptions of law as argumentation, namely, those for which legal reasoning is not only an aspect of the concept of law, but its heart. Cf. for instance Alexy 1978, 1987 and also, more recently, Atienza 2013.

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Nevertheless, it remains instructive to consider what led Kelsen to hold and maintain such a fierce aversion towards practical reason, to the extent of seriously endangering the most significant and lasting achievements of his thought, such as that of the very principle of delegation.

In order to undertake this analysis, the focus will centre upon the *General Theory of Norms*, which – as is well known – was published posthumously. Here, we find the outlines of the final death of practical reason (Hartney 1993), whose initial throes, however, commence from Kelsen's earliest writings. The definitive demise of practical reason leads to other significant elements of Kelsenian normativity being relinquished which, in turn, bears witness to the crucial character of this theme.² Hence, this posthumous work is not to be considered a minor, unremarkable text but, rather, as a central resource in the comprehension of the serious internal difficulties of the overarching Kelsenian conception of law.³ I will explain some of these difficulties in 12 steps.

7.2 The Identity Between Practical Reason and Natural Law

Practical reason – not seen as scientific reason on a par with theoretical-descriptive reason – is considered by Kelsen, from his earliest works (e.g., Kelsen 1998, 3–6), as a central opponent and obstacle to the elaboration of a Pure Theory of law that is far more dangerous than natural law itself.⁴

The explicit engagement with practical reason continues to be a significant aspect in the further development and periodization of Kelsen's work. According to Kelsen, practical reason is “a norm-creating reason.” This concept of reason, as one which is distinctively practical, is untenable for Kelsen because “the function of reason is knowing and not willing, whereas the creation of norms is an act of will” (Kelsen 2005, 196). The severity of this critique is, however, apparently somewhat attenuated in relation to the metaphysical-theological conception of natural law, which for Kelsen is paradigmatic⁵ because, in contrast, it retains the connection between the norm and an act of will, that of God. Thus, human reason knows, but does not produce, the divine norm.

This attenuation is the expression of Kelsen's underlying concern with the critique of Kant and, in particular, Kantian practical reason and the accompanying

²Here I agree with the interpretative thesis that the final version of Kelsen's Pure Theory of law, though marking a surprising break with his own lifelong effort to show the scientific character of his theory of law, is wholly logically consistent with the way in which Kelsen connects legal norms to human volition. Cf. for instance Duxbury 2007.

³For the main issues raised by the *General Theory of Norms*, in particular the doctrine of basic norm and the role of logic in law, cf. Paulson 1992a; Conte 1998 and Celano 1998.

⁴When in the last decade of his life Kelsen gave up the idea that one norm can be logically derived from another, practical reason too in theoretical terms wholly disappears.

⁵“As a matter of fact, there is no natural-law doctrine of any importance which has not an essentially religious character” (Kelsen 1949b, 482).

theory of the existence of evident or purely rational norms. Kelsen will never abandon the belief that the real theorist of practical reason is Kant. Even when he turns to consider Aristotelian practical reason, the orientation of the critique is to elaborate a connection to the Kantian conception (Kelsen 1991, 70 and 80), thereby inadequately distinguishing the specificity and difference of the Aristotelian conception. In this connection, if it is true that Kantian practical reason produces norms, Aristotelian practical reason has instead the task of guiding actions that are not produced by practical intellect but by rational appetite, which is how Aristotle understands the will. However, for Kelsen this is sufficient to show Aristotle's confusion between reason and will which, in his opinion, is the error typical of practical reason. From this Kelsenian position, neither the difference between norms and actions as objects of practical reason nor the difference between producing norms and guiding actions as functions of practical reason is of any significance.

The apparent differentiation between practical reason and natural law becomes increasingly irrelevant in the further development of Kelsen's thought. If we consider the early writings on natural law (Kelsen 1927–28, 1928, 1949a, 1933), the references to practical reason are not the central focus of Kelsen's criticism of natural law. It is only in the final, posthumously published work that practical reason becomes the central focus, and is presented as the greatest error of the natural law doctrine, which Kelsen, in turn, accuses of violating the dualism between Is and Ought (Kelsen 1991, 70).

In conformity with this development of Kelsen's thought, the natural law doctrines which are, at first, taken into consideration are essentially the modern ones, with the exception of Plato's thought (Kelsen 1955–56, 1960a), and it is only in the final phase that the focus is directly on Aristotle (Kelsen 1973 and also 1991, 67–70), who had not previously been considered by Kelsen as a proponent of natural law. The Aristotelian concepts of *entelechy* and practical intellect are the central determinants of the confusion between 'Is' and 'Ought' – the central error of natural law. This approach is combined with the designation of both Kantian and Aristotelian practical reason as elements of theological conceptions of natural law, in which, in the last instance, the commands are those of God (Kelsen 1991, 82). From this final position, Kelsen propounds the complete identification of natural law and practical reason in all its possible variants and these are, in turn, necessarily stripped of all significant difference. The effect of this critique is to generate a position which can be designated as "the identity thesis."

The 'identity thesis', as a form of criticism of practical reason, furnishes Kelsen with two complementary results: on the one hand, it strengthens the conflation of practical reason and natural law thereby enhancing their status as a metaphysical invention⁶; on the other, it provides further proof that practical reason aims to produce norms, since natural law is considered by Kelsen in a similar manner to that of positive law, namely, as a system of norms.

⁶The reduction to natural law is a confutative argument that Kelsen uses other times, as in the case of the *Rule of Law* expunged from the Pure Theory of law with the accusation of being "a natural law prejudice" (Kelsen 1992, 105).

7.3 Is Practical Reason Absolute or Relative?

Kelsen's fundamental critique of natural law arises from the identification and denunciation of its metaphysico-theological foundations. The principles of natural law are ultimately derived from both God's will and of God's thought because it is only in God that reason and will coincide. Hence, divine reason is effectively practical reason, the only permissible practical reason (Kelsen 1991, 5). However, in God's absolute reason there is no longer a distinction between the theoretical and practical dimension. Human practical reason, namely, action aiming at what is reasonable, contingent, likely, linked to certain circumstances and contexts – practical reason according to Aristotle,⁷ – is not included within this definition. Practical reason is only admissible on condition that there is a coincidence between reason and will. This degree of coincidence or identity, however, finds no inherence in the human world.

The underlying problem, which Kelsen's critique partially reveals, and would itself require a separate, more detailed discussion, is whether there is a necessary or a merely contingent connection between practical reason and natural law doctrine. Does natural law necessarily also imply practical reason? Does practical reason necessarily lead to a defence of natural law? However, this type of question cannot be answered without adopting the position of a specific theory of natural law and a specific theory of practical reason.

One can, nonetheless, as a matter of fact and in principle, plausibly maintain that not all doctrines of natural law are based on practical reason. For, the argument that there are norms or values immanent in nature does not in itself lead to the practical use of reason because the latter could apprehend these norms or values in a theoretical-descriptive manner. Value judgments would be viewed as similar to factual judgments: there would be "metaphysical facts". Even some upholders of Scholastic natural law doctrine can be considered to be supporters of this form of thought. According to Cathrein, for instance, moral obligation derives from a theoretical truth, which indicates which actions are intrinsically good or bad.⁸ This truth refers to human nature as marked by the rule of reason drawn from natural inclinations.

For Kelsen, ultimately, natural law and practical reason are two aspects of the same philosophical error, rejection of which is the condition of possibility for the Pure Theory of law. The critical references of the one to the other take the form of a vicious circle and, in any case, are self-referential. The image of natural law as an order of absolute norms immanent in nature (Kelsen 1949b, 485) or in reason (Kelsen 1949a, 392), which is the alternative rival to the artificial order of the hypothetical norms of positive law, corresponds to the image of practical reason as a

⁷On the main conceptions of practical reason, see Cullity and Gaut 1997. See, also, Wiland 2002.

⁸"Norma honestatis [...] *theoretica* est., indicans, quatenam sint actiones intrinsece bonae vel malae" (Cathrein 1945, 146).

source of knowledge and, at the same time, the production of absolute norms. Consequently, in order to refute the former, it is necessary to denounce the groundlessness of the latter and vice versa.

It is not the purpose of this chapter to determine whether Kelsen's presentation of natural law is the only possible one because it certainly corresponds to some doctrines within the history of natural law which erroneously assimilated practical to theoretical-descriptive reason.⁹ Here, instead, it should be emphasized that Kelsen's configuration of practical reason is a serious misunderstanding of this concept and its function. For, it is only if practical reason conformed with Kelsen's conceptualization that his critique would retain its pertinence.

7.4 Kelsen Against Kant

The established parameters of interpretation have determined that the philosophical matrices of Kelsen's thought have a markedly eclectic character. However, despite this eclecticism, the fact remains that the most powerful original influence is that of Kant (see Tur and Twining 1986). Nevertheless, Kelsen distances himself from Kant in relation to practical philosophy commencing from the early works, and this eventually leads him, in his final work, to extend the purview of his critique to reject even the constructive character of Kant's theoretical reason and to embrace Hume's philosophy (Kelsen 1991, 86).

In the *General Theory of Norms*, Kelsen holds that Kant blurred the separation between Is and Ought in his teleological conception of practical reason,¹⁰ because it did not adhere to a clear distinction between knowledge and will. Hence, according to Kelsen, there is full correspondence between the ontological division between Is and Ought and the anthropological division between reason and will. Kant, although supporting the former, had rejected the latter; and, for Kelsen, had thereby generated a fundamental contradiction.

However, if there is full correspondence between Is and Ought, on the one hand, and reason and will on the other, Kelsen must demonstrate how it is possible to know the Ought descriptively without thereby losing its strictly normative dimension. Uniqueness of method inevitably leads to flattening of the objects of knowledge. In this way one loses the possibility of knowing the Ought as such, namely, as a normativity which is a guide to the human action to be performed. A purely and rigorously descriptive method can only lead us to know facts connected in some way to normativity, but is deprived of the capacity to understand their meaning. In this connection, Kelsenian reason knows only facts and nothing but facts. Thus, from the orientation of this Kelsenian reason the focus of attention shifts from the

⁹ See, for instance, the criticisms by George 2000.

¹⁰ "The self-contradictory concept of practical reason, which is both knowing and willing, and in which the duality of Is and Ought is therefore resolved, is the basis of Kant's ethics" (Kelsen 1991, 80).

central concern. If normativity is not seen as a guide to human action, its *raison d'être* is also lost together with the very meaning of the distinction between Is and Ought. When Kelsen, in this final work, also forgoes the constructive method of legal science, which still bears in itself, though weakly, the traces of practical reason, normativity is made totally dependent on the fiction of an original act of will, namely, on a fact, to boot a fictional one.¹¹ The further consequences of this rejection of practical reason should lead one to consider the final Kelsenian conception as a spurious (or, indeed, usurped) form of normativism.

7.5 The Necessity of a Practical Philosophy

The Pure Theory of law thus assumes two presuppositions which, in turn, depend on general philosophical concepts: (1) assuming a moral and legal positivism, the only objects of knowledge are positive norms, i.e., norms generated by acts of human will¹²; (2) the practical use of reason has no scientific or, in general, cognitive character. The concept of practical reason – as indicated above – is *inherently* contradictory (Kelsen 1960b, 414–425).

The first assumption (ontological) excludes natural law however it is seen as an object of knowledge. The second assumption (epistemological) confines the conception of law and morality as objects of knowledge to the domain of theoretical-descriptive reason.

Initial reflection on these two philosophical presuppositions indicates incompatibility, because if law is a human production, knowledge of it would seem to require, in general, a philosophy of human action as practical philosophy, which is considered to be contradictory on the basis of the second assumption. If law concerns things that can be done by man (things, indeed, that can only be done by man), then it should be considered as an object of practical reason, which deals with the determination of the reasonable way of doing things. It would seem that a conception of law, as produced exclusively by human action, such as legal positivism, should be much more favourable towards the practical reason of natural law itself, which by definition is not made by man.

In this respect, philosophical positivism, which rejects practical reason, is an obstacle to legal positivism which, instead, would require it (Pattaro 1974). However, philosophical positivism will maintain its predominance because the Pure Theory must preserve its scientific character at all costs, which is, thus, also at the cost of

¹¹“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” (Kelsen 1991, 256).

¹²“From the point of the view of ethical and legal positivism, the only norms considered to be objects of cognition are positive norms, that is, norm posited by acts of will, and indeed, by human acts of will” (Kelsen 1991, 4).

not respecting the particular nature of its object and the goals proper to legal knowledge.

Reason is not “practical” merely through the simple fact of thematising the domain of human action but, more strictly, only when it serves to determine the particular action to perform. One knows in order to know how one has to act, since the action to be performed is the true meaning of the Ought. Practical reasoning has as a conclusion, not a proposition, but an action. Accordingly, practical reason is not a reflection *on* human action, but a reflection *for* human action. What makes a science practical is the goal of knowing. A science is practical when the reasons for practising it belong to the object to be known, while in the theoretical sciences it is precisely the contrary. Practical reason, therefore, has an essentially normative character and not a purely descriptive one.

Programmatically, Kelsen certainly assigned to the Pure Theory the task of a scientific knowledge of positive law as such and not the norms of a particular legal system or *a fortiori* the actions that they regulate.¹³ And this is a descriptive task. Besides – as Aristotle himself noticed – there can be science of the contingent only because there is something necessary or permanent in what is contingent. The immutable is also present in the mutability of human action. Nevertheless, these principles or permanent characteristics of action must have a practical dimension, that is, they must have a tendency towards decision and action. Otherwise the descriptive task itself will not be correctly performed. Even if the intention of the theorist is not practical, the object to be known is practical. In this sense, a descriptive theory of law is functional or subsidiary to the normative goal of legal knowledge, which is knowing what action has to be performed. Even the Pure Theory of law does not justify itself, but derives its justification from the ultimate goals of practical reasoning, which leads to a decision or an action. While the need to purify legal theory of sociological and political elements is quite comprehensible, purity cannot be taken to the point of forgoing the practical dimension of law itself.

7.6 The Kelsenian Approach to Human Action

Kelsen’s starting point is, correctly, human action and, in particular, the act of will of those who are empowered to command and prescribe that something ought to be. This manner of commencement becomes open to question when it concerns the more specific purpose of conceiving the world of law, which, initially, appears as a set of institutional structures governed by internal rules and interpretive social practices that make those structures operative in social contexts. However, Kelsen’s perspective is dependent on the configuration of positive law in the nineteenth-century

¹³“The Pure Theory of law is a theory of positive law, of positive law as such, and not of any special system of law. It is general legal theory, not an interpretation of particular national or international legal norms” (Kelsen 1992, 7).

elaborated by a legal science linked to imperativism. From within this underlying orientation – as noted by Fuller – “[the] law should not be viewed as the product of an interplay of purposive orientations between the citizen and his government but as a one-way projection of authority, originating with government and imposing itself on the citizen” (Fuller 1969, 204).

The particular manner of commencement is always and, therefore, also for a theory of law, the decisive orientation. Kelsen starts from a particular type of human action, whose subjective meaning is that of a command directed towards other people’s behaviour.¹⁴ Indeed, if law is produced by man, it is necessary to privilege the original moment of production, as legal imperativism also held. But Kelsen’s approach to human action drastically excludes any teleological explanation. This – as is well known – develops according to the following sequence: a state of things is aimed at as *good* and, therefore, becomes an object of will and, thus, a *goal* of action, which, in turn, dictates the rules or *norms* that should guide action towards its ideal conclusion. According to Kelsen, this sequence has to be inverted and divided into two parts as follows: the *norm*, without which there is not yet any Ought, indicates the abstract *goodness* of the behaviour conforming to it and has no relationship with the *goal*, which concerns the psychological and factual aspects of will (see Viola 2003, 11). We, therefore, have an inversion of the constitutive aspects of human action with the result that it renders human action unintelligible in its unity. This extends to every type of action and for every type of agent, in regard to both the person who commands and the addressee of the command.

Another consequence of the Kelsenian conception of human action is to configure it as a world which is closed in upon itself or self-contained. This entails denying, from its inception, that the fundamental problem of law is coordination between human actions and, in particular, between the actions of those empowered by a valid legal norm (the norm-positing authorities) and the actions of the addressees of their commands (the norm-addressees). For Kelsen, the fundamental problem of law is establishing an objective Ought and not the relationship between human actions.

It is interesting to notice that, according to Kelsen’s original vision, it is impossible to conceive of a will directed towards other people’s behaviour. This is the error typical of imperativism, which considers the legal norm as a command directed towards other people’s conduct. This clashes with the psychological conception of will, which Kelsen takes from the thought of Christoph Sigwart (Sigwart 1904) and Friedrich Jodl (Jodl 1906, 1908a, b). There is only the existence of a will when, in human consciousness, there is a representation of the satisfaction of a need or a tendency through a future event that depends on the activity of the person who wants or desires. When the future event depends on others, there will be wishing, but no willing in the strict sense (Kelsen 1923, 110).

Even when this preceding conception is relinquished, and Kelsen admits that the will can be directed towards “the behaviour of a being who understands the meaning of willing and can behave in accordance with it” (Kelsen 1991, 26–27), a direct

¹⁴“The norm is not concerned with a *human being* in all that he is and does; it is only with a certain human *behaviour* that it is concerned when it decrees it to be obligatory” (Kelsen 1991, 29).

relationship between the actions of different agents is still precluded. Only indirectly, namely, through an inward-looking approach, can every agent refer to the action of another agent.¹⁵ In any case, the relationship between agents is conceived as a relationship between mental states and not as an encounter concerning what is to be aimed at as good.

7.7 Kelsenian Intentionality

Even within the narrow confines of this perspective Kelsen confronts the problem of the meaning of acts of will. The subjective meaning of the act of will is permeated with intentionality,¹⁶ which relates to Ought and is directed at those people to whom the command is addressed, who, in turn, must comprehend this subjective meaning as an objective meaning if the command is empowered by a norm. Thus, it is necessary to consider that the intentions of the legislator, on the one hand, and, on the other, the acts of knowledge of the norm-addressee, which considers a subjective meaning as objective, are both relevant to understanding the norm and to enacting it.¹⁷ However, for Kelsen, this combination is not considered to be necessary.

The subjective meaning to be attributed to the norm does not strictly concern the concrete behaviour that the norm-addressee, as agent, has to enact, but only the fact of its existence as an obligation. This distinction appears very strange, and it leads to the question of how it is possible to want an Ought without willing its contents (cf. Celano 1990, 229). It is because we want others to behave in a certain way that we want them to have to behave in that way. Kelsen seeks to avoid the intention of the act of will being transferred into the norm and, thereby, also to prevent the possibility of a belief that the norm is for a purpose or wants something. Purpose is alien to legal construction (Bjarup 2013, 181). According to Kelsen, the norm itself does not want anything except to make the Ought exist.¹⁸

The manifest aversion to a notion of an end is understandable.¹⁹ For it is not possible to want an end without somehow knowing it. Intentionality is charged with a double meaning: it is intending or knowing something and simultaneously an orientation towards it. The end cannot be wanted if it is not foreseen or known before being reached. This is an essential element of consideration of the legal subject as

¹⁵For the difference between an inward-looking approach and an outward-looking approach, which alone can guarantee the guiding function of a norm, cf. Rodriguez-Blanco 2014, 118–121.

¹⁶“An act whose meaning is that another person (or persons) is to behave in a certain way” (Kelsen 1991, 2).

¹⁷On intentionality in Kelsen’s thought, see Rodriguez-Blanco 2014, 101–121.

¹⁸“Only the person positing the norm by an act of will – and not the norm itself – can aim for something or pursue an end, for only a person can want something; a norm does not ‘want’ anything” (Kelsen 1991, 11).

¹⁹Cf. the criticisms of Aristotle in Kelsen 1991, 67–70.

an agent, that is, one “capable of purposive action” (Fuller 1955, 1307)²⁰ and responsible for this. In a doctrine which makes a clear separation between intellect and will there is no place for intentionality because the will itself cannot set itself any end without somehow knowing it. However, without intentionality it is no longer even possible to speak of a subjective sense of an act of will or of a subjective meaning. For an act of will to have meaning, we have to forgo the strict separation between intellect and will.

Kelsen considers the relationship between means and end as analogous to a cause and its effect²¹; it belongs to *Müssen* and not to *Sollen*. The end is considered as a result or a desired effect. This means that the end is not really the principle that sets the action in motion or that for which someone acts. Consequently, the norm being followed or obeyed does not belong to its meaning (Guastini 2013, 68). Otherwise the norm would arise as the end of the action, and we should admit final causality as different from causal necessity. For Kelsen, the Ought is not a matter of a relationship “either between a norm and behaviour agreeing with this norm, or between an act of positing a norm and behaviour agreeing with the norm” (Kelsen 1991, 11).

Thus, the rejection of practical reason inexorably leads to the disappearance of the importance of agency for theory of law and with it the agent himself.

7.8 The Concept of Objective Meaning

The concept of an objective meaning of an act of will also raises problems that are very difficult to solve. In relation to this concept, the focus is not upon an intention, because this is always subjective, but upon the way in which norm-addressees, who believe they are faced with binding norms because of the presence of empowerment, consider the intention of the legislator. Nevertheless, the distinction between subjective and objective meanings is not made significantly more intelligible in this manner. It is clear, however, that Kelsen confronts the issue on the theoretical rather than the practical level, since “practical reason is concerned with *what to do* as theoretical reason is concerned with *to believe*” (Thorton 1982, 59). Here, Kelsen is concerned with the legal qualification of an action, namely, what it is believed to be.

Indeed, the subjective meaning of an action concerns not only what is being done or what someone intends to do, but also the legal meaning that the agent attributes to his or her action, in virtue of the relationship it has with a norm to which the agent believes it applies. In this case, we are concerned with the “subjective legal meaning”, which is a self-interpretation of the legal meaning of one’s own act (Kelsen 1992, 9–10). Since one can be deceived regarding the effective legal meaning of

²⁰See, also, Rundle 2012.

²¹“The statement about a necessary relation between willing the end and willing the means is true only if it means that the relation between the means as cause and the end as effect is one of causal necessity” (Kelsen 1991, 18).

one's action, we must not confuse the subjective legal meaning, based on a belief, with the objective belief, based on legal science. It is precisely on the basis of this distinction that the Pure Theory of law asserts its own specificity and differentiates itself from a sociological jurisprudence.²²

In this manner, an objective legal meaning is a subjective legal meaning conforming to a valid norm that, in turn, is the objective legal meaning of another act of will and so forth. Hence, the overtly theoretical and non-practical character of the objective meaning, which depends on the Basic Norm presupposed, in the final instance, is devoid of all intentionality. In this way, law is no longer a question of what has to be done, but of what one needs to believe one is doing. The practical sphere is not yet, however, entirely discarded.

As is well known, Kelsen believes that legal science, as it is formulated by the Pure Theory, is able to distinguish between what people believe is the legal meaning of an act and its true and objective legal meaning. It is legal science that ascertains the existence of a system of valid legal norms and, through this process, subjective meanings are recognized as objective. Legal science carries out this task not by resorting to what people believe is law, but by constructing a system of norms on the basis of the presupposition of a *Grundnorm*. It therefore seems that to establish the objectivity of the legal meaning it is necessary to resort to scientific reason, which, however, in this case, would inevitably fulfil a practical function. For this reason, Kelsen was gradually to downplay the constructive role of legal science, but at the price of not providing a satisfactory answer regarding the foundation or justification of the objective meaning of an act of will. In this connection, it does not seem that one can avoid the alternative between either the derivation of normativity from social facts linked to the beliefs of law users or the foundation upon the scientific construction of the system of valid norms by jurists. Kelsen chose the latter alternative, which is deeply rooted in the western legal tradition whereby the work of legal doctrine is a constitutive part of law itself. In describing its own object, legal science inevitably contributes to its shape and justification, thus performing what to all intents and purposes is a practical function.

It remains unclear whether, for Kelsen, the recognition of a norm is an act of knowledge or of will because it is both the apprehension of the existence of a norm empowering the command, on the one hand, and willingness to have to act as the new norm requires, on the other (Kelsen 1991, 44). This further reinforces the analysis that it is very problematic to introduce radical distinction between knowledge and will.²³

²²Cf., as first reference, Kelsen 1911 and the texts collected in Paulson 1992b.

²³For a critical evaluation of the Kelsenian distinction between subjective and objective meaning, see Vinx 2007, 32–37.

7.9 The Necessity of Practical Reason for Objective Meaning

Beyond the level of knowledge and will, there are reasons of an ethical and political nature that require us to distinguish a legal system of valid norms from the arbitrary exercise of a sovereign power.

If Kelsen's norm-addressees hold that the subjective meaning of commands is an objective meaning, namely, they believe they are faced with binding norms (duties), this means they have reason to think so, or at least should have. The fact that subjective commands are somehow judged to have an objective meaning is still not enough if there are no reasons to believe the whole normative chain makes sense, and this requires a value judgment, which also extends to the *Grundnorm* itself. These reasons ultimately rest on considering it reasonable that a society should be guided by rules that are binding in a normative sense, and that they should be administered by officials according to well-defined procedures of identification and application. All this implies that there is an objective and autonomous value of *legality*, which, in turn, depends on a political theory or on a theory of justice (Vinx 2007, 31). This value must be perceived as a good state of affairs worthy of being pursued by all participants.

In the absence of these reasons and this value, the entire apparatus of the delegation of power, no matter how sophisticated, cannot justify itself and be distinguished from a criminal organization aiming to subordinate the will of others through the threat of coercion. Empowering is not in itself sufficient to distinguish the command of a highwayman from that of a moral or legal authority (Kelsen 1991, 27); we also need a judgment, from the practical point of view, regarding the meaningfulness of this form of organization of social life. The very concept of normative validity is based on reasonableness, because it aims at ensuring some conditions of justice that law must have, however formal they are.

This critical overview is intended to demonstrate that, in order to eliminate practical reason, it is not enough to refuse the application of logic to norms, to reject the constructive or productive role of legal science and consider legal organs as the immediate norm-addressees; we must also neutralize the presence of intentionality and the relevance of reasons that induce the addressees to recognize the normativity of law.

7.10 The Centrality of Norms

According to Kelsen, the whole realm of the Ought is produced by human will and is composed of norms and only of norms. If it were not so, a potential field for the exercise of practical reason would remain open, for example, in the area of morals and one would have to admit the existence of absolute and objective value judgments. For Kelsen, value always comes after the norm and indicates the compliance of behaviour with it (positive value) or non-compliance (negative value) (Kelsen

2005, 17). This judgment may be true or false, though in a different sense from a judgment of fact.

If the value were not derived from a norm, then, according to Kelsen, it would be irremediably subjective, since it would be founded on the desire or will of one or many individuals. In this connection, there is nothing that is, by itself, desirable, but only states of affairs that are in actual fact desired by one or many individuals. We will, therefore, have a subjective value judgment that is at the same time a judgment of fact (Kelsen 2005, 20–22).

In the Kelsenian configuration of the realm of the Ought, there is no alternative other than the fallacious one between a world of norms immanent in nature or in reason and absolute value judgments, because there are absolute norms. For Kelsen, there is no possibility of a middle way between the two. Consequently, positive law drives out natural law and vice versa. But if we conceive practical reason from within the Aristotelian tradition (see e.g. Westberg 1994), which – as noted above – Kelsen had long ignored almost entirely, one has an understanding of the Ought that is completely different from the drastic choice between absolute norms and hypothetical norms. Above all, norms are no longer at the centre of the Ought, but at its periphery and have a role that is functional to the end to be reached or achieved.

If the world of the Ought were only inhabited by norms, as Kelsen believes, then it would be impossible to understand its internal dynamism. In this connection, the Ought, by definition, is oriented towards being, i.e., towards the action to be performed. But for Kelsen “Ought ‘aims at’ nothing but itself: Ought” (Kelsen 1991, 59). This means that this Ought is normatively inert. This is quite understandable since the Ought, by itself, lacks that attractiveness that is proper to values, even admitting that they are relative and subjective. If one forgoes the primacy of the value over the norm, the latter loses all capacity to initiate action. The Ought will no longer be directed towards the *Is*.

Indeed, for normativity norms are not in themselves sufficient, and we also need reasons to establish them, to recognize them and obey them. These reasons relate to actions in relation to which the norms are directed, that is, the being to which the Ought tends. There can be no legal or moral normativity without respect for the conditions necessary for agency.

7.11 Practical Reason and the Concept of Law

This question is not the internal one of rights and duties that one has because of law, i.e., a question arising within a particular legal system, but that of the very existence of legal norms. Even if we admit that the contents of norms do not require any justification in terms of reasonableness, at least belief in the existence of positive norms needs justification. The hypothetical assumption of the validity of a Basic Norm is not enough because we still have to reflect upon the particular reasons for which the need for this assumption is based and, ultimately, why the commands of the delegated authority are preferable to the threats of highwaymen.

Kelsen believes that the limits of a theory of law are constituted by the Basic Norm and that its purview should not extend to the consideration, or thematization, of the reasons for the necessity, or even the appropriateness, of the governance of a society by valid rules conferring on legal organs the authority to make law. In this sense, the theory is pure, namely, independent of the legal practice in which law is in fact steeped in value judgments, ideologies and the actions and intentions of the legislative and adjudicative institutions. The pure doctrine must break free from value judgments that, with their accompanying relativism, would destroy the scientific basis of the theory. The elimination of the value judgments internal to legal practice is not, however, the same operation as the elimination of the reasons for the very existence of this practice.

While admitting that, in its application, law is intertwined with non-legal elements, the reasons why law exists cannot be excluded from the concept of law without the latter losing its strictly normative justification and, thus, its meaning. The acts of will that posit norms as empowered by higher norms must be distinguishable from senseless actions, and included among those worth enacting and endowed with a worthwhile purpose, because they are functional to a normative order that a society requires in order to organize itself on the basis of the principle of legality.

One can place into question whether this is the best way to organize social life and also whether the Pure Theory is the most coherent and effective description of the structure of positive law. Nonetheless, the theorist will continue to be guided by the reasons why it is better that a society should be governed by law rather than by unempowered acts of an arbitrary will. The statements of a legal theory will not be able to be completely detached from commitment to law.²⁴

For its part, the Pure Theory shows an appreciation of law that is perhaps even excessive, so much so as to hold that it must find its justification in itself, and not within the general goals of social life and the problems of social coordination. If law is a means or “a specific social technique” – as Kelsen himself defines it (Kelsen 1941) – then the reasons for which law exists will have to be part of its concept. However, one must not identify the latter consideration with the purely instrumental use of practical reason.

It could be said that, even if our desires were entirely irrational, the instrumental role of practical reason, which strives to find the most rational means to realize those desires, would remain valid. Nevertheless, Kelsen rightly denies that this way of conceiving practical reason has a truly normative character.²⁵ But this is not the case because, in law, the aspiration to legality as a value is a rational desire that confers normativity on legality as a social means or technique. However, for the sake of the argument, it could also be said that if, following Hume, one maintains the essential irrationality of ultimate goals, this still does not deny that one has a

²⁴On this theme cf. Raz 1998.

²⁵“The saying ‘Who wills the end, must will the means’ is the answer to the question ‘What *must* I do in order to realize a certain end?’, and this is a different question from ‘What *ought* I to do?’” (Kelsen 1991, 9).

prevailing “reason” to do what effectively promotes the realization of the “ultimate” desire, rather than the penultimate one or any other before (Cullity and Gaut 1997, 8).

The concept of law to which reference is made here indicates an orientation of value, still very indefinite, in which the search for the means contributes to its further determination and specification, often in a controversial way. While searching for the means, practical reason confers shape and ascription to the goals.

7.12 The Practical and the Moral Perspective

These basic reasons of the legal undertaking are practical reasons. The practical perspective must not be confused with the moral perspective nor with traditional natural law (cf. Murphy 2001). That an action is generally worth pursuing, and that it is reasonable to establish a social order respectful of the conditions of agency, still does not entail that it is morally or legal binding. It only means that we have entered the field of the Ought which is governed by practical reasoning aiming at establishing the practical principles in the best, most correct or most appropriate way to justify the task to be undertaken.

Without this basic practical dimension, understanding of social orders, institutions and norms would be quite impossible. One cannot adequately comprehend things produced by an individual’s work without having in mind the reasons and the goods that with them one intends to pursue. We cannot understand a social practice if we do not know its reasons and the objectives it proposes that justify the norms and the limitations of human freedom, which are sometimes very serious. As we know, with law forms of coercion are introduced and are considered legitimate. They require a high degree of practical justification establishing the practical need for well-defined and controllable procedures. It cannot be maintained that “the dynamic aspect of law” (Kelsen 2005, 205–220; 267–278), considered as a whole, can replace this practical justification because, even if it is more sophisticated, it continues to be a technique or procedure like others and as such needs an external justification.

The evolution of contemporary law, marked by the primacy of constitutional principles and by the protection of human rights, has further underlined the centrality of legal reasoning, namely, of the perspective of practical reason, for legal theory itself. Kelsen certainly did not deny that, in practice, law is subject to the influence of ethical, political and social elements. Nevertheless, if all this is inevitable in practice, one has to wonder why legal theory never has to extend its domain of reflection to encompass these elements. In the insistence upon the value of scientific reason is it permitted to eliminate or marginalize all aspects that escape its grasp?

For Aristotle, sciences are both those that can always exhibit valid demonstrations and those that in most cases reach valid conclusions.²⁶ It is true that he distinguished practical philosophy, which deals with principles, namely, the goals, and therefore has a universal object, from *phronesis* which, dealing with means, has the character of opinion and contingency, just as particular actions, that are the fruit of deliberations and not of real demonstrations, are contingent. Nevertheless, the close connection between goals and means makes this distinction very subtle (cf. e.g. Aubenque 2014), also because the *raison d'être* of practical science is only realized when orientation towards a good goal is followed by the capacity to identify the most suitable means for its realization.

7.13 Conclusion

In conclusion – as Finnis notes – law belongs to that kind of thing for which we must first answer the question “Why, if at all, should we have it?” before addressing the question “What is it?” (Finnis 2003, 129).

Practical reason, therefore, presents a description of the Ought which furnishes an alternative to that of Kelsen. It aspires to be an integral part of a theory of law in which it is constitutive of the Ought in general and of law in particular. The attempt to explain normativity through a prior exclusion of all reference to practical reason is a hopeless enterprise. It leads the theory of law to forgo a comprehensive understanding of the essential purpose of law, confining itself to projects of sophisticated research in selected areas that are surely helpful and often admirable, but normatively inert and effectively inconclusive.

John Gardner, from a positivistic perspective, has recognized that strictly speaking “legal positivism is a thesis only about the conditions of legal validity” (Gardner 2001, 224), but the question remains open of whether and when the valid legal norms are also worth following or obeying, namely, when they are normatively alive or active. Can we say that a legal theory is also complete without the answer to this second question in relation to which legal positivism is “in itself entirely agnostic” (Ibid 225)?

The failure of the Kelsenian conception of normativism, particularly evident in his last work, is the confirmation that exclusion of the cognitive capacity of practical reason prevents the configuration of a third way between the facticity thesis of traditional legal positivism and the normativity thesis of natural law doctrine. However, it is not only a matter of admitting a different form of knowledge from the theoretical-descriptive one but also, and moreover, of challenging the starting point of a theory

²⁶ However, Kelsen does not take in account this epistemological difference when he examines the close connection, in Aristotelian thought, between metaphysics and politics. He understands the dualism between the best constitution in itself and the more suitable constitution as an ambiguity (Kelsen 1937).

of law, which is, in turn, to place into question whether it originates in norms or in action, in authority or in agency.

The normativity of law does not coincide with the centrality of norms if they are presented as entirely inert, ideal entities produced by a process of cognition. It requires the recognition of the centrality of goods and values whose evaluation is submitted to examination by processes of reasoning and public deliberation in order to determine the criteria of judgment that are to be the guide for action. Reason, as practical reason, should be based not on norms or even on desires but, rather, on justified values (see Heuer 2004). Hence, the normativity of law has to be fundamentally detached from the framework of Kelsenian normativism whether that of legal science of positive law or of the final, posthumous *General Theory of Norms*.

For these reasons the normativity of law has not to be identified with Kelsenian normativism.

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