

DIE REINE RECHTSLEHRE AUF DEM PRÜFSTAND

HANS KELSEN'S PURE THEORY OF LAW: CONCEPTIONS AND MISCONCEPTIONS

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Fictionalising Kelsen's Pure Theory of Law

MAXIMILIAN KIENER

Abstract: This essay raises a new challenge for Hans Kelsen's *The Pure Theory of Law*, i. e. what I call the *Cognitivist Challenge*. This challenge concerns the question as to how to retain Kelsen's view about relative legal norms, i. e. that one can objectively cognise these norms, while not rejecting his view about absolute moral norms, i. e. that one *cannot* objectively cognise those norms. After explaining the *Cognitivist Challenge* in detail, I will present *Positive Legal Fictionalism* as a solution to it. I will claim that *Positive Legal Fictionalism* is rooted in Kelsen's own statements and provides the specific epistemic advantages that Kelsen's project of cognising the law requires. *Positive Legal Fictionalism* thereby deepens the understanding of Kelsen's project as a 'theory' and as 'pure.'

Keywords: Hans Kelsen, Legal Positivism, Fictionalism, Cognition, Validity, Basic Norm

Schlagworte: Hans Kelsen, Rechtspositivismus, Fiktionalismus, Erkenntnis, Geltung, Grundnorm

Introduction

Hans Kelsen (1881–1973) was one of the leading so-called 'legal positivists' in the 20th century. He was a legal positivist because he exclusively focused on "questions of what the law *is* and how the law is made [i. e. the law as it is *posited*], not [on] (...) questions of what the law *ought* to be."¹ Kelsen separated his position from natural law theory by denying that law, in order to be law, "must have some concern for justice, be it a matter

¹ Kelsen, Hans. *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*. (Henceforth abbreviated as PTL₁). Translated by B.L. Paulson and S. Paulson. 2004, Oxford Clarendon, 7. Emphasis added. In addition to referring to the English translation, I will also provide references to the German original. See Kelsen, Hans. *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934*. Edited by M. Jestaedt. (Henceforth abbreviated as RR₁). 2008, Tübingen Mohr Siebeck, 15.

of assuring an ethical minimum, be it a matter of attempting, however inadequately, to be ‘right’ law, that is, simply, to be just.”²

However, unlike many other positivists, Kelsen denies that the validity of legal norms (or in other words their normative bindingness) can ever be derived from the fact that people by and large comply with them. Kelsen adheres to a strict distinction of ‘is’ versus ‘ought’ and claims that a norm (i. e. an ‘ought’) can never receive its validity from a fact (i. e. an ‘is’) but only from another norm. Accordingly, a norm is valid if and only if it can be traced back to a higher norm which confers validity upon it. As the chain of validity-conferring norms cannot go back infinitely, Kelsen claims that the validity of legal norms ultimately depends on a first norm, the validity of which no longer depends on another norm. Kelsen calls such a norm the *basic norm* and presents it as a non-positive norm (i. e. a norm that is not *posited* and therefore not part of a given legal system) and as a norm that is merely presupposed in thought. The basic norm authorises the highest positive norm, e. g. the constitution, and can be schematically formulated as follows:

“Coercive acts ought to be performed under the conditions and in the manner in which the historically first constitution, and the norms created according to it, prescribe. (In short: one ought to behave as the constitution prescribes.)”³

As the basic norm is necessary for the validity of norms, it will also be crucial for the *cognition* of the law as objectively valid, which Kelsen describes as his main objective:

“my aim from the very beginning was to raise it [i. e. jurisprudence] to the level of a genuine science, a human science. The idea was to develop those tendencies of jurisprudence that focus solely on cognition of the law rather than on the shaping of it, and to bring the results of this cognition as close as possible to the highest values of all science: objectivity and exactitude.”⁴

In this essay, I aim to make two contributions to the debate on Kelsen. Firstly (1), I want to draw attention to a serious challenge to Kelsen’s project of the cognition of the law, pertinent to both editions of *The Pure Theory of Law*, which I call the *Cognitivist Challenge* and which has not received attention in the literature. Secondly (2), I want to show how trying to solve the *Cognitivist Challenge* leads to a deeper understanding of Kelsen’s project as a ‘theory’, i. e. a project concerned with cognition, and how it is ‘pure’, i. e. separated from morality as well as separated from sciences concerned with

² Kelsen, PTL₁, 22. (RR₁, 32.)

³ Kelsen, Hans. *Pure Theory of Law. Translated from the Second (Revised and Enlarged) German Edition by Max Knight.* (Henceforth abbreviated as PTL₂). 2009, Clark The Lawbook Exchange, Ltd., 201. Also with regards to the second edition, I will provide references to the German original: Kelsen, Hans. *Reine Rechtslehre. Studienausgabe der 2. Auflage 1960.* Edited by M. Jestaedt. (Henceforth abbreviated as RR₂). 2017, Tübingen Mohr Siebeck, 359. See also Kelsen, RR₁, 76.

⁴ Kelsen, PTL₁, 1. (Footnote 1).

matters of fact as opposed to norms. In particular, I will aim to solve the *Cognitivist Challenge* by presenting an account I call *Positive Legal Fictionalism*. From an exegetical perspective (2.1), I will claim that *Positive Legal Fictionalism* can be firmly rooted in Kelsen's own statements, albeit it sometimes needs to develop Kelsen's statements further rather than taking them for granted. Therefore, *Positive Legal Fictionalism* will be a Kelsenian but not quite Kelsen's own account. From a systematic perspective (2.2), I will then explain the specific epistemic advantages that *Positive Legal Fictionalism* provides for Kelsen's project of cognising the law, thereby solving the Cognitivist Dilemma, and emphasise the value of fictionalism for legal positivism. Finally (3), I summarise my results and draw conclusions.

This essay is very ambitious. To address and solve the *Cognitivist Challenge*, I will need to take into account a very wide scope of Kelsen's primary texts: Kelsen's early writings, the two editions (from 1934 and 1960) of Kelsen's *The Pure Theory of Law*, work from Kelsen's late period, as well as Kelsen's correspondence with other scholars. In addition, I will need to link the debate on Kelsen to claims from the philosophical and metaethical debate on so-called fictionalism, i. e. a link which has not been explored in the debate on Kelsen so far. And finally, I will also always need to balance exegetical and systematic aspects in the course of developing my arguments.

The combination of such ambition and the usual space constraints will prevent me from discussing the wide body of secondary literature on Kelsen's work in detail. On the one hand, I will thereby have to leave the reader with room for further inquiry, i. e. an inquiry into how my approach exactly aligns or conflicts with the majority view on some of Kelsen's claims. On the other hand, it is precisely such an approach that will enable me to focus on very important exegetical and systematic aspects in sufficient depth, thereby providing a fresh take on many of Kelsen's claims. Hence, I hope that the way in which I will proceed in this essay, including my scarce treatment of secondary literature, is not only excused with reference to space constraints but also appreciated as intrinsically linked to the object to my inquiry and the ambition I pursue.

1. The Cognitivist Challenge

Hans Kelsen presents *The Pure Theory of Law* explicitly as a "theory." By "theory", he means that *The Pure Theory of Law* "aims solely at cognition of its subject-matter"⁵ and is therefore a genuinely scientific project. Kelsen then identifies as the subject-matter the legal norm, which he claims can be stated in the form of a conditional: it (legally) *ought* to be the case that if some natural event X occurs then the legal consequence Y is imposed. Kelsen continuously emphasizes that one can reach objective cognition

⁵ Kelsen, PTL1, 7. (Footnote 1).

of the legal norm, and at its core the ‘legal ought’, thereby grounding a genuine “Rechtswissenschaft”⁶ (legal science). Objective cognition consists in the cognition of a legal norm’s objective validity. A legal norm is objectively valid if and only if it is genuinely normatively binding, which means that the legal norm’s normative force cannot be reduced to either subjective wishes or preferences or to any other psychological or sociological facts.

On the other hand, Kelsen endorsed a diametrically opposed view about moral norms. Most notably in the first edition of *The Pure Theory of Law*, Kelsen contends that a moral norm is a “logosfremdes Objekt”⁷ (alien to objective inquiry⁸) and “cannot be accounted for by way of rational cognition.”⁹ That something *morally* ought to be the case does not qualify as a suitable object of a “Wissenschaft.” Moral norms cannot be objectively valid because, if they exist at all, they always depend on psychological or sociological facts. And if they cannot be objectively valid, there cannot be objective cognition of them in the sense outlined.

Hence, taken at face value, Kelsen draws a stark contrast between legal and moral norms in the first edition of *The Pure Theory of Law*. However, a closer look reveals that there is another hidden distinction. When Kelsen talks about moral norms in the first edition, he always talks about *absolute* moral norms;¹⁰ and when he talks about legal norms, he always talks about *relative* legal norms. A norm is absolute if its validity does not depend on any other norm, and relative if its validity depends on another norm. Therefore, Kelsen does not contrast *moral* norms with *legal* norms after all. He contrasts *absolute* moral norms with *relative* legal norms.

Unfortunately, employing these two different distinctions at once (i. e. moral versus legal, relative versus absolute) obfuscates what Kelsen aims to say. This is because the distinction between moral and legal norms does not map on to the distinction between absolute and relative norms: there may be relative moral norms (as ethical relativism claims) and absolute legal norms (as natural law theory claims). And Kelsen explicitly recognises this in the second edition of *The Pure Theory of Law*. But if there can be relative moral norms and absolute legal norms, this leaves us with the following question: do absolute moral norms fail as objects of cognition because they are *moral* norms or because they are *absolute* norms? What exactly is Kelsen’s position? Unfortunately, both alternatives lead to problems.

Let us first assume that norms cannot be an object of cognition if they are *moral* norms and thereby follow what Kelsen seems to claim in the first edition. On this

⁶ Kelsen, RR1, 15. See also the foreword. “Rechtswissenschaft”, unlike “legal science”, does not suggest affinity to natural sciences. (Footnote 1).

⁷ Kelsen, RR1, 27. (Footnote 1).

⁸ The translation in Kelsen PTL1 as “alien to logic” seems too narrow. See Kelsen, PTL1, 17. (Footnote 1).

⁹ Kelsen, PTL1, 17. (Footnote 1).

¹⁰ In PTL1, Kelsen always implies that moral norms are absolute. See Kelsen, PTL1, 16–18, 22–23, 28, 34. (RR1, 26–29, 33, 40, 47). (Footnote 1).

reading, the combination of Kelsen's view about legal and moral norms becomes very puzzling. This is because Kelsen himself stressed that the 'legal ought' and the 'moral ought' converge on the category of 'ought' as their *genus proximum*.¹¹ Therefore, one might think if the 'legal ought', unlike the 'moral ought', can be an object of cognition, this must be because of what is distinct about the 'legal ought.' However, Kelsen's answer is that the "distinction between law and morality consists in the fact that the law is a coercive order"¹² whereas morality is not such a coercive order, viz. morality does not impose a "coercive act of the state."¹³ But this does not explain why one 'ought' (legal) is an object of cognition while the other 'ought' (moral) is not. Hence, this first interpretation of Kelsen's contrast of different norms seems to lead to a dead end.

But how about the interpretation, according to which Kelsen claims that norms cannot be an object of cognition if they are *absolute*? This seems to be the position that Kelsen later endorsed in the second edition of *The Pure Theory of Law*. Kelsen claims that "an absolute value in general and an absolute moral value in particular is rejected from the point of view of scientific cognition."¹⁴ On this basis, both moral and legal norms can be objectively valid and an object of cognition, as long as they are relative. Consequently, Kelsen concedes in the second edition, opposing his claims in the first edition, that ethics is the "discipline directed toward their [i. e. moral norms'] cognition"¹⁵ and refers to ethics as "the science of morals."¹⁶ However, even on this reading, it remains puzzling why only relative but not absolute norms can be an object of cognition? How can *relativity* facilitate *objective* validity and *objective* cognition? And moreover, after giving up the distinction between the moral and the legal, how can Kelsen preserve the distinction between morality and the law, which he is so keen to stress as part of legal positivism? Hence, the second interpretation of Kelsen's contrast of different norms also leads to difficult questions.

In the following, I will use the term *Cognitivist Challenge* to describe the challenge of how to retain Kelsen's view about the relative legal norms, i. e. that one can objectively cognise these norms, while not rejecting his view about the absolute moral norms, i. e. that one *cannot* objectively cognise these norms. A solution to the *Cognitivist Challenge* will be of vital importance for understanding Kelsen's project as a 'theory', viz. a

11 See Kelsen, PTL1, 26. (RR1, 37.) (Footnote 1).

12 Kelsen, Hans. The Function of a Constitution, in: *Essays on Kelsen*. Edited. by R. Tur and W. Twining. 1986, Oxford Clarendon, 112. See also Kelsen, RR1, 37. (Footnote 1).

13 Kelsen, PTL1, 26. (Footnote 1).

14 See PTL2, 63. (RR2, 128). See also Kelsen, PTL2, 18, 67, 68–69. (RR2, 50, 134, 137). Kelsen, *Problem der Gerechtigkeit*, in Kelsen, RR2, 689. In my translation: Kelsen rejects "from the point of view of scientific knowledge (...) the existence of an absolute in general and absolute values in particular (...) and only [recognises] the validity of relative values." (Footnote 3).

15 Kelsen, PTL 2, 59. (RR2, 119). (Footnote 3).

16 Kelsen, PTL2, 86. (RR2, 169). See also Kelsen, PTL2, 8, 19, 22, 64. (RR2, 33, 51–52, 56, 126). (Footnote 3).

project of objective cognition and as a project that is ‘pure’, viz. a project separated not only from empirical sciences but also from morality.

2. Positive Legal Fictionalism as a Solution to the Cognitivist Challenge

In this section, I will develop what I call *Positive Legal Fictionalism* as a solution to the *Cognitivist Challenge*. Support for *Positive Legal Fictionalism* comes from an exegetical perspective, showing that it can be firmly rooted in Kelsen’s own statements, and from a systematic perspective, demonstrating how it effectively assists Kelsen’s project of cognising the law and thereby solves the *Cognitivist Challenge*. However, before I elaborate on these two perspectives, I want to outline my proposal. *Positive Legal Fictionalism* consists of the following two claims:

Error Theory: There are no objectively valid norms. Hence, there is no objective cognition of norms¹⁷ and any statement asserting the existence of objectively valid norms is false.

Legal Fiction: Employing a fiction facilitates objective cognition of *relative legal norms*, which would otherwise not be possible, and provides further epistemic advantages for the cognition of the law.

In a nutshell, the solution that *Positive Legal Fictionalism* proposes to the *Cognitivist Challenge* is the following: it is correct that no norm, legal or moral, relative or absolute, can be an object of cognition – actually speaking. However, resorting to a fiction allows us nevertheless to separate the class of relative legal norms from all other norms and promote legal norms in a way that facilitates objective cognition of them. One caveat is required here: there can be objective cognition of these norms *qua* norms insofar these norms’ validity does no longer depend on any facts or psychological preferences but only on another norm, i. e. the fiction, which I will shortly explain with reference to the basic norm; and therefore the legal norms’ validity as well as their cognition can be objective, notwithstanding the fact that such validity will be fictional just like the fiction itself. *Positive Legal Fictionalism* understands ‘fiction’ as a false assumption and identifies as the fiction the assumption of an existing basic norm. The basic norm *qua* fiction is supposed to ensure that Kelsen’s project is a theory, i. e. concerned with objective cognition, as well as that Kelsen’s project is pure, i. e. separated from morality and empirical sciences. The fiction can do this by providing the basis for objective va-

¹⁷ Note, it is about objective cognition of norms *qua* norms. This is still consistent with saying that there can be objective cognitions of norms understood as sociological or psychological facts.

lidity, i. e. validity which cannot be reduced to either subjective wishes or preferences or to any other psychological or sociological facts, but which depends on norms only.

This solution to the *Cognitivist Challenge* sidesteps the dead end from the first interpretation of Kelsen's contrast mentioned earlier: *Positive Legal Fictionalism* does not consider the law as a coercive order as being the reason why legal norms, but not moral norms, can be an object of cognition. Moreover, *Positive Legal Fictionalism* also sidesteps the difficult questions for the second interpretation: it does not imply that it is just the relativity of norms that makes them suitable objects of cognition. It is the fiction applied to the positive law that renders relative legal norms suitable for objective cognition.

As the fiction is applied to legal norms only, *Positive Legal Fictionalism* is consistent with Kelsen's claim in the first edition of *The Pure Theory of Law* that only legal norms, but not moral norms, can be objects of cognition. Moreover, *Positive Legal Fictionalism* is also in accordance with Kelsen's claim in the second edition of *The Pure Theory of Law* that only relative norms can be objects of cognition: the fiction is an absolute norm (i. e. the basic norm) which is not itself an object of cognition but only facilitates the cognition of other relative norms, the validity of which depend on the fiction in the relevant way.

One caveat is required at this point: *Error Theory* must not be confused with Adolf Julius Merkl's "Fehlerkalkül", which is an entirely different idea. The term *Error Theory*, as I use it, is not concerned with the question as to whether or to what extent those legal norms which contradict other higher legal norms are still legally valid, but rather focuses on the systematic falsity of certain statements. So understood, *Error Theory* is common terminology in philosophical metaethics and, in particular, stems from John Mackie's seminal work in his book *Ethics: Inventing Right and Wrong*.

To further explain and vindicate *Positive Legal Fictionalism* as a solution to the *Cognitivist Challenge*, I will firstly highlight the exegetical basis of *Positive Legal Fictionalism* in Kelsen's work (2.1) and then, on this basis, elaborate on how, from a systematic perspective (2.2), *Positive Legal Fictionalism* solves the *Cognitivist Challenge*.

2.1 The Exegetical Perspective: The Basis of Positive Legal Fictionalism in Kelsen's Work

Error Theory generalises Kelsen's claims about absolute moral norms to all norms. Not only moral and absolute norms but also legal and relative norms are barred from being an object of cognition.

Error Theory is supported by Kelsen's own statements. Emphasizing a clear distinction between 'is' and 'ought', Kelsen held that any norm (legal or moral), i. e. any 'ought', could derive its validity (i. e. objective validity) only from another norm, i. e.

an ‘ought’, but never from facts, i. e. an ‘is.’¹⁸ However, the chain of norms conferring validity on other norms cannot extend infinitely. Therefore, if a particular norm is to be objectively valid, there has to be one *first* norm the validity of which no longer depends on another norm, i. e. there has to be one *absolute* norm. However, Kelsen rejects the existence of absolute norms, and in the absence of absolute norms no norm can be objectively valid. Hence, *Error Theory*. Note that this is consistent with anything Kelsen says about the basic norm. Kelsen does not claim that the basic norm *actually exists* but only presents it as a condition necessary for the validity of norms.

While *Error Theory* corroborates Kelsen’s statements about norms not being suitable objects of cognition, *Legal Fiction* aims to explain how Kelsen can still claim that there is objective cognition of relative legal norms. *Legal Fiction* claims that a *fiction* can separate the class of relative legal norms from all other norms and promote these relative legal norms in such a way as to *make* them objects of cognition. *Legal Fiction* proposes to recast Kelsen’s account of ‘presupposing the basic norm’ as ‘employing a fiction’ and thereby explain the role of the fiction.

As already mentioned, Kelsen introduced the basic norm to explain the validity of relative legal norms. The basic norm is the first and absolute norm that stops an infinite regress of the chain of validity conferring norms. Kelsen explains the basic norm as merely ‘presupposed’ (“voraus-gesetzt”) and as a purely non-positive norm. Kelsen calls the basic norm a ‘hypothesis’ and a transcendental condition of the very possibility for positive law to be objectively valid.¹⁹ Kelsen claimed that all norms in a legal system have to converge on one single fundamental norm, the ‘basic norm’, if they are to be considered objectively valid. Converging on the basic norm makes these norms objectively valid because their validity cannot be reduced to either subjective wishes or preferences or to any other psychological or sociological facts. Their validity ultimately depends on a norm, i. e. the basic norm.

Recasting Kelsen’s account of ‘presupposing the basic norm’ as ‘employing a fiction’ then leads to the following explanation of *Legal Fiction*: the fiction is the basic norm and the fiction is employed by presupposing the basic norm in thought. The basic norm qua fiction is only applied to positive legal norms within a legal system and thereby separates the class of legal norms from other norms, e. g. moral norms. The basic norm qua fiction makes such legal norms objects of cognition by providing the necessary basis for their objective validity: a first and absolute norm, i. e. the basic norm which invests all the positive legal norm with objective validity. The basic norm

¹⁸ See Kelsen, PTL 1, 193. (RR 2, 346). (Footnote 1 and 3).

¹⁹ See Kelsen, PTL1, 58, 64, 70. (RR1, 77, 85, 93) Kelsen, PTL2, 101–107. (RR2, 197–207). (Footnote 1 and 3). Kelsen, Hans. *General Theory of Law and State*. Translated by A. Wedberg. 1945, Cambridge, Harvard University Press, 110, 134, 401, 406, 437. Kelsen abandons the notion of “hypothesis” in favour of a fiction in: Kelsen, Hans. *General Theory of Norms*. Translated by Michael Hartney. 1991, Oxford Clarendon, 256. I will later take up this point once more.

renders all these legal norms into relative legal norms, which ultimately depend on the basic norm. So understood, *Legal Fiction* is an interpretation as well as a further development of Kelsen's doctrine of the basic norm. To see where it is interpretation and where it is further development, I need show in greater detail how *Legal Fiction* accords with Kelsen's own statement on fictions (2.1.1) and his alleged method for cognising the law: Kantian transcendentalism (2.2.2).

2.1.1 Kelsen on Fictions

Kelsen thought about fictions at several points in his career. Two such points deserve special attention. Firstly, as early as in 1919, Kelsen writes on Vaihinger's account of legal fictions. Agreeing with Vaihinger, Kelsen claims that there are "true, i. e. epistemological fictions in legal science (...) of the attempt to know the law, dictions of the intellectual mastery of the legal order."²⁰ It is indeed most noteworthy that, from a very early stage, Kelsen claims that there are *epistemological* fictions, i. e. fictions that are supposed to assist the "intellectual mastery of the legal order."²¹ However, Kelsen does not elaborate much on this point. He only mentions the 'person' as a legal fiction and argues that using such a fiction may provide the "advantages of *illustration* and *simplification*."²² The 'person' provides these advantages by offering a vivid picture instead of the mere juridical and technical description of a bundle of obligations and rights.

Secondly, from 1960 onwards, Kelsen draws his attention again to legal fictions. Two significant differences occurred at this point, however. Firstly, Kelsen now considers his own account from a fictionalist standpoint and not only other accounts like Vaihinger's. He thinks of his basic norm as a fiction.²³ Secondly (and related to the first point), whereas Kelsen's 1919 essay was only concerned with fictions *within* the law (the 'person') Kelsen's consideration of the basic norm as a fiction now focuses on fiction *about* the law as a whole.

Unfortunately, Kelsen's position from 1960 onwards is inconsistent with his position in 1919. This inconsistency is most obvious when Kelsen, after 1960, claimed that the basic norm is a fiction insofar as it "contradict[s] reality"²⁴ and explicitly revokes earlier statements about norms ('Ought') not being able to contradict reality ('Is'),

²⁰ Kelsen, Hans. On the Theory of Juridic Fictions. With Special Consideration of Vaihinger's Philosophy of the As-If, in: *Legal Fictions in Theory and Practice*. Edited by M. Del Mar and W. Twining. 2015, Switzerland Springer, 5.

²¹ Ibid., 5.

²² Ibid., 7. Emphasis in original.

²³ See for instance Kelsen, Hans. On The Pure Theory of Law. *Israel Law Review*, 1966, 1–7.

²⁴ Kelsen, Hans. The Function of a Constitution, in: *Essays on Kelsen*. Edited. by R. Tur and W. Twining. 1986, Oxford OUP, 117.

which formed the basis of his view in 1919. As a result, any fictionalist interpretation of Kelsen needs to take sides.

Following Kelsen completely in his view in 1960 and later would partly sidestep the *Cognitivist Challenge*. This is because his 1960 view less emphatically stresses the distinctness of the realm of 'ought' and norms, i. e. what Kelsen aims to reach objective cognition of. My aim in this essay is therefore to retain Kelsen's view that norms cannot contradict reality. I will consider the basic norm as a fiction, not in the sense of fictions contradicting reality (i. e. in the realm of 'Is'), but in the sense of stating something that does not exist in the realm of 'Ought'.

Hence, *Positive Legal Fictionalism* embraces Kelsen's claims concerning fictions about the law (i. e. the fiction is the basic norm), the claim about fictions providing genuinely epistemic advantages, and claims about the distinctness of 'is' and 'ought'. *Positive Legal Fictionalism* is thereby maximally close to Kelsen's own statements. It only departs from Kelsen where Kelsen's contradicting statements made a departure inescapable and the choice between contradicting statements was made with an eye to upholding rather than sidestepping the *Cognitivist Challenge*.

However, it must also be stressed that *Positive Legal Fictionalism* goes beyond Kelsen's own statements. It goes beyond Kelsen's claims by recommending that the view on fictions, developed from Kelsen's own claims, be applied to all phases of Kelsen's work, including the first and second edition of *The Pure Theory of Law*, and not only to the later sceptical phase in Kelsen's life that is usually associated with Kelsen being a fictionalist if he is considered a fictionalist at all. This is a first reason why *Positive Legal Fictionalism* is a Kelsenian but not quite Kelsen's own account.

2.1.2 Kelsen on Kantian Transcendentalism

By expanding the fictionalist reading to all phases of Kelsen's work, *Positive Legal Fictionalism* competes with the most widely accepted interpretation of Kelsen's method in cognising the law: Kantian transcendentalism. In this subsection, I will claim that fictionalism is a better exegetical basis for Kelsen's method in cognising the law than a qualified version of Kantian transcendentalism.

In *The Pure Theory of Law*, Kelsen focuses on the conditions under which the cognition of positive law as objectively valid becomes possible. Kelsen claims that this approach resembles Kant in his inquiry into the conditions of the possibility of cognition in the natural sciences.²⁵ Therefore, the basic norm, i. e. what Kelsen identifies as the

²⁵ See Kelsen, PTL2, 202. (RR2, 361). (Footnote 3).

condition for cognising the positive law as objectively valid, is to be considered “cognitively and theoretically transcendental in terms of the Kantian philosophy.”²⁶

Despite such alleged common ground, many commentators correctly pointed out that Kelsen's link to Kantian transcendentalism is rather loose.²⁷ To begin with, whereas Kant's inquiry (and also the inquiry of Neo-Kantians like Cohen whom Kelsen refers to) was about the very conditions of cognition as such, Kelsen's inquiry is only about *one way* of looking at *one particular area* of the world, i. e. the positive law. Kelsen indeed claims that:

“The Pure Theory of Law is well aware that the specifically normative meaning of certain material facts, the meaning characterized as ‘law’, is the result *not of a necessary* interpretation but of a *possible* interpretation, possible only given a certain basic presupposition.”²⁸

As a result, Kelsen admits that one could simply refuse to accept his conditions of cognising the law as objectively valid and instead consider legal norms as mere acts of power and domination. However, in Kant's account, in contrast, it was not possible simply to reject the transcendental conditions of cognitions and choose a different way of looking at things.

Secondly (and as a result of the first difference), Kant's and Kelsen's uses of the term ‘hypothesis’ diverge considerably. When Kant identifies the conditions of cognition as such, he states these conditions as ‘hypotheses’. By ‘hypotheses’, he means claims that he cannot directly prove but only postulate through the transcendental method. Nevertheless, for Kant, a hypothesis is something that can be true and is indeed assumed to be a good candidate for a true claim. This is different in Kelsen. Although the basic norm is also called a ‘hypothesis’, Kelsen does not mean something that can be true. The basic norm, being a norm, cannot be true, according to Kelsen. And Kelsen explicitly states that the basic norm does not exist.

Referring to these differences, commentators suggested that Kelsen lacked sufficient acquaintance with Kantian transcendentalism.²⁹ However, this is a rather un-

²⁶ Kelsen, PTL1, 25. (RR1, 36). (Footnote 1) Kelsen expresses his allegiance to Kant in other places too. See Letter to Treves in Kelsen papers, 171. Similar statements also appear in earlier and later work. For earlier work, see Kelsen, Hans. *Hauptprobleme der Staatsrechtslehre. Entwickelt aus der Lehre vom Rechtssatze* (from 1923). 1960, Aalen Scientia, Vorrede, XVII.

²⁷ See Wilson, Alida. Joseph Raz on Kelsen's Basic Norm. *The American Journal of Jurisprudence* 27 (1982), 49. Dreier, Horst. *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, 1986. Nomos Baden-Baden, 44, 81–89. Winkler, Günther. *Rechtstheorie und Erkenntnislehre. Kritische Anmerkungen zum Dilemma von Sein und Sollen in der Reinen Rechtslehre aus geistesgeschichtlicher und erkenntnistheoretischer Sicht*. 1990, Wien New York Springer, 107–108.

²⁸ Kelsen, PTL1, 34. Emphasis added. (RR1, 47). He repeats this point in Kelsen, PTL2, 218 (RR2, 393). (Footnote 1 and 3) See also Kelsen, Hans. Value Judgments in the Science of Law, in: *What is Justice? Justice, Law, and Politics in the Mirror of Science. Collected Essays by Hans Kelsen*. 2013. Clark The Lawbook Exchange, Ltd., 226–227.

²⁹ See for instance Wilson, 1982, 48. (Footnote 27).

charitable interpretation and in this subsection I want to claim that Kelsen's departure from Kant was to a great extent deliberate and should therefore be appreciated rather than criticised. Framing Kelsen's method in fictionalist terms rather than transcendental terms can charitably capture Kelsen's departure from Kant and should therefore be the preferred interpretation of Kelsen's method in cognising the law.

Support for a fictionalist interpretation comes from what commentators sometimes overlook, namely that Kelsen himself stressed that he employs the Kantian philosophy only "by analogy"³⁰: it is just the focus on *conditions of the possibility of cognition* that links Kelsen to Kantian Philosophy in some loose sense. There are other aspects of (Neo)-Kantian transcendentalism that Kelsen explicitly rejects. In a little-known letter to Renato Treves from 1933, Kelsen contrasts the conditions of the possibility of cognition developed by Kant and Cohen with his own conditions of the possibility of cognizing the positive law. Kelsen claims that Kant and Cohen adhered to a "contentually constituted, materially determined *a priori*"³¹, by which he meant that Kant and Cohen adhered to substantial value judgements and potentially a form of value realism, i. e. the assumption of absolute values. Kelsen, in contrast, rejects such values and is looking only for "purely formal categories of *a priori* validity."³² The basic norm is supposed to be completely formal in the sense of not including any substantial or absolute values, or any restriction on what legal norms may proscribe. The basic norm merely supports whatever the highest positive legal norm, i. e. the constitution, states.

Moreover, in the same letter, Kelsen claims that moral relativism is "something that Cohen – exactly like Kant on this point – was not prepared to accept, if only because of his religious convictions."³³ However, moral relativism is key to Kelsen's own account. Kelsen fiercely rejects absolute norms and denies they could be accounted for by way of rational cognition.

In order to keep the basic norm purely formal as well as defend ethical relativism, Kelsen had to claim that the basic norm is indeed just *one contingent way* of looking at the positive law as well as deny that the basic norm can be true in the sense Kantian hypotheses can be true. If the basic norm were a materially-determined, true, and absolute norm, Kelsen would undermine his relativism about norms and the purely formal nature of the conditions of cognising the positive law.

Therefore, Kelsen's letter to Treves shows that his departure from presenting the very conditions of cognition as such and the adherence to 'hypotheses' as truth-apt was not simply due to a lack of acquaintance with Kant. It can be seen as deliberate and

30 Kelsen, PTL2, 202. (RR2, 361). (Footnote 3).

31 Kelsen, Hans. The Pure Theory of Law, 'Labandism', and Neo-Kantianism. A Letter to Renato Treves, in: *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, ed. by Stanley L. Paulson and Bonnie Litschewski. 1998, Oxford Clarendon, 173. Original emphasis.

32 Ibid.

33 Ibid.

necessary to uphold central features of his account, even if Kelsen did not explicitly say so in the *Pure Theory of Law*. Therefore, it is no surprise that Kelsen, even though he still declares allegiance to Kant and Cohen in focusing on an inquiry into the *conditions of the possibility of cognition*, rejects Kant's and Cohen's overall framework as versions of "natural law theory."³⁴

These exegetical data require a choice: one could either continue interpreting Kelsen as employing Kantian transcendentalism but with all these necessary qualifications that (as commentators correctly claim) take away what is genuine about Kantian transcendentalism; or one could develop a different interpretation that aligns more closely with all of Kelsen's claims. In the rest of this subsection, I will opt for the second route and claim that a fictionalist framework, as given by *Legal Fiction*, can account for all of Kelsen's claims and should therefore be adopted.

To begin with, *Legal Fiction* recognises Kelsen's attempt to identify the conditions under which cognising the law as objectively valid is possible. *Legal Fiction* recognises the basic norm qua fiction as the necessary condition for the possibility of objection cognition of relative legal norms. As such, *Legal Fiction* can be understood per analogiam to Kantian transcendentalism in the restricted sense Kelsen refers to. But operating with a fiction leaves no doubt that employing the fiction is only one way of looking at the positive law. My fictionalist proposal does not imply that the basic norm is the only way, or even an especially privileged way, of looking at the positive law. And it is precisely the contrast between a fiction and a Kantian hypothesis that maps on to the contrast between Kelsen's basic norm and a Kantian hypothesis. A fiction is something we do not assume to be true but actually know is false or non-existing. This is exactly what Kelsen says about the basic norm but what would be misleading to say about a 'hypothesis'. And in fact, Kelsen later abandoned the notion of 'hypothesis' in favour of the notion of a "fiction".³⁵ As a result, the fiction is purely formal and not, as Kelsen thought about Cohen's and Kant's approach, contentually-constituted and materially-determined. The fiction is the basic norm and as such comprises only what Kelsen attributes to the basic norm. Finally, since the basic norm is a fiction, applied to the law, it does not imply any claims about morality. Therefore, it is compatible with ethical relativism as Kelsen defends it.

Hence, *Legal Fiction* can account for all of Kelsen's claims. On this basis, I propose reconstructing Kelsen's method of cognising within a fictionalist framework rather than within a framework of Kantian transcendentalism. However, it must be noted that preferring fictionalism over Kantian transcendentalism does not imply abandoning the characterisation of Kelsen's account as Kantian or Neo-Kantian altogether. Other aspects of Kelsen's account that are usually considered (Neo)-Kantian can still

³⁴ Ibid.

³⁵ Kelsen, Hans. *General Theory of Norms*, 1991, Oxford Clarendon, 256. (See Footnote 18).

remain in place. These aspects are: (i) the assumption of 'is' and 'ought' as separate and irreducible categories; (ii) the assumption of the validity of norms in terms of binding force; (iii) the emphasis of genuine normativity of legal science, where legal science is sharply contrasted with more empirical approaches like legal sociology.³⁶

2.1.3 Summary

This section (2.1) outlined the exegetical basis of *Positive Legal Fictionalism* in Kelsen's own claims. However, *Positive Legal Fictionalism* did not merely adapt Kelsen's claims but went beyond them in two ways: firstly, as there was no consistent account of a legal fiction in Kelsen, *Positive Legal Fictionalism* had to reconstruct such an account from Kelsen's contradictory claims. *Positive Legal Fictionalism* then applied this account to all of the different phases in Kelsen's work and not only to the latter sceptical phase. Secondly, *Positive-Legal-Fictionalism* suggested reinterpreting Kelsen's method in cognising the law as a fictionalist approach rather than as a Kantian transcendental approach. In the next section (2.2), I will elaborate on how *Positive Legal Fictionalism* contributes to a project of cognition required to solve the Cognivist Challenge.

2.2 The Systematic Perspective: The Contribution of Positive Legal Fictionalism to a Project of Cognition

It may seem paradoxical that a fictionalist account, i. e. an account relying on false claims, could ever contribute to a project of cognition. However, if *Positive Legal Fictionalism* is to be a solution to the Cognitivist Challenge, I need to explain how it contributes to objective cognition. To do this, I will firstly elaborate on fictionalism as a scientific method more generally (2.2.1), then specify the particular epistemic advantages that come with the assumption of the basic norm qua fiction (as made by *Positive Legal Fictionalism*) (2.2.2), and finally explain how *Positive Legal Fictionalism* not only provides epistemic advantages but also remains loyal to legal positivism (2.2.3).

³⁶ See Bulygin, Eugenio. An Antinomy in Kelsen's Pure Theory of Law, in: *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, ed. by Stanley L. Paulson and Bonnie Litschewski. 1998, Oxford Clarendon, 297–315.

2.2.1 Fictionalism as a Scientific Method

Recall that Kelsen claimed that there are “epistemological fictions in legal science (...) of the attempt to know the law, dictions of the intellectual mastery of the legal order.”³⁷ In order to illustrate how a fiction could assist such intellectual mastery, Kelsen gives the following example:

“And we have to speak of a fiction as soon as cognition (and especially juridic cognition) takes a detour in knowing its object (and in juridic knowledge this object is the law, the legal order, the legal ought), a detour in which it consciously sets itself in contradiction to this object; and be it only in order to better grasp it: just like a rock-climber, in order to avoid an obstacle and reach his goal more easily, is sometimes forced to temporarily climb downwards, i. e. in a direction directly opposed to his goal, the peak.”³⁸

So, according to Kelsen, a fiction can be a device that helps to overcome an obstacle to cognition. Such an obstacle can be overcome, Kelsen argues, if we allow the fiction to take us on a “detour” and thereby identify an alternative path to cognition. Unfortunately, Kelsen does not elaborate on how such a “detour” can be mapped out in detail. However, the metaphor of rock-climbing is instructive. And most interestingly, it resembles a method that Vaihinger, whom Kelsen knew, once attributed to Fermat's solution of a mathematical problem. Therefore, Vaihinger's interpretation of Fermat may help to specify Kelsen's take on how fictions assist cognition, even if Kelsen does not explicitly refer to it.

Vaihinger presented his reader with the following mathematical task: suppose you would like to divide a line into two parts, x and $a-x$, so that the term $x^2(a-x)$ is maximally large. Vaihinger claims that it was impossible to provide a solution until Fermat employed a particular trick.

Fermat substituted the x in the term $x^2(a-x)$ with $(x+e)$, leading to the new term: $(x+e)^2(a-x-e)$. He then equated the original term with the new one, reaching the following equation: $x^2(a-x) = (x+e)^2(a-x-e)$

By equating both terms, Fermat consciously made a false assumption, Vaihinger claims. Fermat knowingly equated two unequal terms. After multiplying all the terms, Fermat then reached the following equation: $2ax + ae = 3x^2 + 3xe + e^2$

In order to reverse his initial false assumption (i. e. arbitrarily adding e to the equation), Fermat cancelled all the terms containing an e . However, arbitrarily cancelling all the terms containing an e is in itself another false assumption, Vaihinger claims: one must not simply leave terms out of an equation.

³⁷ Kelsen, Footnote 19, 5.

³⁸ Ibid.

After cancelling all terms containing an e and shifting everything but x to the left side, Fermat reaches $2a/3 = x$ and this is indeed the solution to the problem: if the line x is divided into parts, x and $a-x$, so that $2a/3 = x$, the term $x^2(a-x)$ is maximally large.

On Vaihinger's interpretation, Fermat used two false assumptions as tools in his arithmetic operation. He made a first false assumption (i. e. arbitrarily adding e to the equation) to facilitate an easier arithmetic calculation and made a second false assumption (i. e. dropping all terms containing an e) in order to reverse the initial false assumption. Vaihinger calls this the "method of opposite errors", i. e. errors that neutralise each other.

Fermat's solution, at least in Vaihinger's description, seems to illustrate what Kelsen says about the metaphor of the rock-climber: "just like a rock-climber, in order to avoid an obstacle and reach his goal more easily, is sometimes forced to temporarily climb downwards, i. e. in a direction directly opposed to his goal, the peak"³⁹, so is Fermat, in order to avoid a mathematical obstacle, forced to temporarily depart from the truth, i. e. think in a direction directly opposed to his goal, the truth. Fermat does this by means of his first false assumption. And just as the rock climber's adjustment of his position allows him to "reach his goal more easily"⁴⁰ later, so can Fermat reach the true solution to the problem more easily after relying on a false equation that he later neutralised by means of a second well-chosen false assumption.⁴¹

Vaihinger's interpretation of Fermat's solution illustrates how false assumptions, i. e. fictions, may help to achieve cognition. Moreover, Vaihinger's interpretation is strikingly close to how Kelsen himself describes how fictions can help legal science, and Kelsen in fact knew Vaihinger's book containing this interpretation.⁴² Therefore, applying Vaihinger's interpretation to Kelsen's Pure Theory of the Basic Law may be a plausible way of explaining the epistemic significance of the fiction in Kelsenian terms. So, let us transfer this take on fictions to Kelsen's Pure Theory of Law:

Just as Fermat faced an arithmetic predicament, Kelsen can be seen to face a predicament concerning the validity of norms. According to *Error Theory*, there are no objectively valid norms. However, legal science in Kelsen's sense, if it is to be possible at all, is only possible if there are objectively valid norms.

Just as Fermat employed a false assumption to overcome an arithmetic predicament and facilitate an easier arithmetic calculation, Kelsen can be seen as employing the

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Vaihinger, Hans. *Die Philosophie des Als Ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschheit auf Grund eines idealistischen Positivismus. Mit einem Anhang über Kant und Nietzsche*. 1918, Leipzig Meiner, 200 ff.

⁴² Admittedly, it is not certain that Kelsen knew this passage when writing about fictions, but it is nevertheless likely. Vaihinger's book was published in 1918 and Kelsen published a review of it in 1919, the same year in which his other paper appeared from which the rock-climbing metaphor is taken. See Kelsen, Footnote 20.

basic norm qua fiction to overcome the legal predicament of there being no objective validity. Once the basic norm, understood as a fiction, is presupposed, all relative legal norms within a particular legal system are invested with objective validity.

However, just as Fermat reversed the initial false assumption in order to reach the correct result, Kelsen also has to prevent the fiction from distorting the results reached. After the basic norm qua fiction is presupposed, Kelsen's can be interpreted as adding something like a tag to any legal norm saying that legal norms are valid only on the basis of the fiction, i. e. on the basis of this mere product of thought, but not valid in any more robust sense. Kelsen may have done this by introducing the *Rechtssatz* (rule of law) as opposed to the *Rechtsnorm* (legal norm). Kelsen explains both terms as follows:

"Rules of law [i. e. *Rechtssätze*] (...) are hypothetical judgments stating that according to a national or international legal order, under the conditions determined by this order, certain consequences determined by the order ought to take place. Legal norms [i. e. *Rechtsnormen*] are not judgments, that is, they are not statements about an object of cognition. According to their meaning they are commands, they may also be permissions and authorizations."⁴³

Hence, *Rechtsnormen* are the legal norms that I presented as the subject-matter of *The Pure Theory of Law*. *Rechtssätze* are statements about those norms and usually take the following form: according to the legal system X, such and such ought to be the case. The prefix 'according to the legal system X' can be read as the required tag. On a fictionalist interpretation, this prefix can be read as "according to the fiction in legal system X". This tag makes clear that objective validity still depends on the fiction and prevents the results from being distorted, that is from stating objective validity independent of a mere product of thought. Hence, similarly to how Fermat's dropping all terms containing an *e* neutralised his initial false assumption, Kelsen's prefix in his *Rechtssätzen* prevents the potential false assumption of objective validity that exists independently of the fiction and makes clear that objective validity is still dependent on arbitrary presupposition.

However, there seems to be a difference between Fermat and Kelsen. Whereas Fermat's second false assumption neutralised his first false assumption, Kelsen – on this interpretation – only highlights but does not neutralise the use of a fiction. The falsity of stating norms of objective validity does not disappear. *Error Theory* is still in place and, as I will show in section 2.2.3, still plays an important role. At this point, I only want to highlight this difference from Fermat. Kelsen prevents distorted results by a different strategy from that which Vaihinger attributes to Fermat.

⁴³ Kelsen, PTL2, 71. (RR2, 141). (Footnote 3).

2.2.2 The Epistemic Advantages of the Legal Fiction

In the last subsection (2.2.1) I tried to explain the seemingly paradoxical claim that fictions, i. e. deliberate departures from truth, can sometimes be used to reach the truth. I claimed that both Fermat and Kelsen can use an initial fiction to overcome a predicament and later prevent the fiction from leading to distorted results. This method strikingly resembles Kelsen's own description of the use of fictions in his metaphor of the rock-climber, and it is a plausible assumption that Kelsen knew about Vaihinger's interpretation of Fermat and was inspired by it.

In this subsection (2.2.2), I want to be more specific and describe the particular epistemic advantages that come with the basic norm interpreted as a fiction. These epistemic advantages fall into two groups: firstly, there are all the epistemic advantages that Kelsen attributes to the basic norm independent of considering it a fiction. Since I proposed to recast Kelsen's account of presupposing the basic norm as employing the fiction, the epistemic advantages of the basic norm can be re-interpreted as the epistemic advantages of the fiction. Secondly, however, there are also epistemic advantages that specifically stem from the basic norm being a *fiction*. Such epistemic advantages are not already among those which Kelsen highlights but still contribute to his overall project of cognising the law.

Let me start with the first set of advantages, those already associated with the basic norm independent of considering it a fiction. Consider the following passage from Kelsen:

"That an assembly of people is a parliament, and that the result of their activity is a statute (in other words, that these events have this 'meaning'), says simply that the material facts as a whole correspond to certain provisions of the constitution. That is, the content of an actual event corresponds to the content of a given norm."⁴⁴

Kelsen here claims that a legal norm *renders* "actual events" into something with legal significance: there is a parliamentary law (i. e. legal event) and not only a group of people writing down some rules they wish to be complied with (i. e. natural event); there is an instance of murder (i. e. legal event) and not just an instance of killing (i. e. natural event), etc. Without a legal norm, or more precisely without objectively valid legal norms, there would only be *natural* but not *legal* events. Kelsen seems to think of something like a *parallel or augmented reality*.⁴⁵ However, all this is only possible

⁴⁴ Kelsen, PTL1, 10. (RR1, 19). (Footnote 1).

⁴⁵ See Kelsen, Hans. Value Judgments in the Science of Law, in: Kelsen, H. *What is Justice? Justice, Law, and Politics in the Mirror of Science. Collected Essays by Hans Kelsen*. 2013. Clark, The Lawbook Exchange, Ltd., 227: "If the system of legal norms is an ideology, it is an ideology parallel to a definite reality." See also 2008, 49, where Kelsen qualifies the pure theory as an ideology behind a reality which is supposed to conform to this ideology. See also "Welt des Sollens" and "Welt des Seins" in Kelsen, 1960, e. g. 5 ff. (Footnote 26).

after presupposing the basic norm because only the presupposition of the basic norm ensures objective validity. Therefore, legal practice arises and is intelligible as a *legal* practice only by presupposing the basic norm.

Hence, Kelsen's own statements allow the extracting of a specific reason for employing the basic norm as a fiction: presupposing the basic norm makes the legal practice – insofar as it is concerned with legal cognition – intelligible. More particularly, these passages allow us to extract two ways in which presupposition of the basic norm contributes to “*cognizing* positive law.”⁴⁶ Firstly, it facilitates *legal propositional knowledge*, viz. knowing *that* there are certain legal things (parliamentary law, murder, etc.), which would not legally exist without the presupposition of the basic norm. Secondly, it facilitates *legal understanding*, viz. understanding why actual events bring with them certain legal characteristics. It is because they correspond to norms which are invested with validity by the presupposition of the basic norm. On this basis, the legal scientist can know that there are certain norms, certain legal events, also that a group of norms leading back to the same basic norm belong to the same legal system, and understand why all this is true: namely because of the link to the basic norm.

However, over and above those epistemic advantages associated with the basic norm independent of its interpretation as a fiction, there are also epistemic advantages specifically connected with the basic norm *qua fiction*.

Firstly, fictionalist accounts can avoid the disadvantages of realist accounts or natural law theories but still have the same advantages as these views. A disadvantage of realist accounts of norms or natural law theory is often seen in their commitment to complicated ontology. However, the advantage of these theories is their simple semantics. Realist accounts and natural law theory make genuine propositional assertions about norms. As a result, such statements can be robustly true or false and they are subject to principles of logic and inference. Such simple propositional semantics, truth-aptness, and the applicability of logical principles seem to be conducive to a scientific project, other things being equal.

Fictionalism can avoid the disadvantage of complicated ontology but still provide the advantages of realist accounts. Fictionalism can avoid complicated ontology by adhering to an error theory, e.g. rejecting any absolute norms, which natural law theory claims exist and which Kelsen continuously highlighted as ontologically incomprehensible. At the same time, however, fictionalism can still claim that there are genuine assertions about the subject matter. It may be true that there are no norms. However, one can still state that ‘according to the legal fiction, such and such a norm exists’ (i.e. Kelsen's *Rechtssätze*). Such statements are genuine assertions with propositional content. As such, these statements fall under simple realist semantics and can therefore be robustly true or false as well as subject to principles of logic and inference. Hence, a first

⁴⁶ Kelsen, PTL1, §8. Emphasis added. (RR1, 77). (Footnote 1).

epistemic advantage of fictionalist accounts like *Positive Legal Fictionalism* is that it can avoid complicated ontology while providing the same advantages as natural law theory.

Secondly, another advantage of *Positive Legal Fictionalism* comes from a distinction available to all fictionalist accounts, namely the distinction between *accepting* and *believing* claims. *Accepting* a claim means endorsing it for the time being without believing it to be true. *Believing* a claim in contrast means taking the claim to be true. Fictionalist accounts can make this distinction by interpreting certain claims as systematically false (e.g. due to a *Error Theory*) and thereby oppose believing in those claims. However, fictionalist accounts can still argue that one should accept these claims for reasons other than their literal truth (e.g. the specific advantages connected to the fiction, which may be epistemic, pragmatic, political, or aesthetic.)

L. J. Cohen used this distinction in a discussion of methods in science more generally. He argued that a scientist who only *accepts* his hypotheses, claims, and theories is superior to a scientist who *believes* them. Concerning the later, he says:

“possession of a belief that p might make him less ready to change his mind about accepting that p if new evidence crops up or a better theory becomes available. It might even make him less ready to look for new evidence or a better theory, when otherwise he would have done so.”⁴⁷

Hence, ‘accepting’ instead of ‘believing’ claims leads to a greater open-mindedness and willingness to revise one’s theories, which may be conducive to a project aiming at cognition.

Positive Legal Fictionalism, being a fictionalist account, can resort to the distinction between acceptance versus belief and thereby provide an epistemic advantage for a Kelsenian project of cognising the law. Due to *Error Theory*, a legal scientist embracing *Positive Legal Fictionalism* would never believe in legal norms, that is take them to be objectively valid, full stop, or even take them to be true. A legal scientist would only accept the legal norms provisionally, that is accept them as part of a contingent legal system and on the contingent fictionalist assumption of a presupposed basic norm. As a result, a legal scientist embracing *Positive Legal Fictionalism* does not cling on to legal norms in any way but is indifferent to changes in them. As a result, the statements about those norms, the *Rechtssätze*, are also subject to radical contingency. They are radically contingent because they would need to change whenever *Rechtsnormen* change. And this is the case even though *Rechtssätze* – unlike *Rechtsnormen* – can be robustly true or false. So, the fictionalist legal scientist only accepts *Rechtsnormen* and, since *Rechtsnormen* are the basis for *Rechtssätze*, he is also maximally open-minded for changing *Rechtssätze* whenever “new evidence crops up or a better theory becomes available”, to use Cohen’s phrase again.

⁴⁷ Cohen, Laurence Jonathan. *An Essay on Belief and Acceptance*, 1992, Oxford OUP, 88.

Hence, insofar as open-mindedness can be considered an epistemic virtue in line with Cohen's description, *Positive Legal Fictionalism* – being a fictionalist account – can claim to provide this virtue for a project of cognising the law.

2.2.3 Fictionalism and Legal Positivism

In the last two subsections (2.2.1 and 2.2.2), I tried to explain the use of a fiction as a scientific method more generally as well as specify the particular epistemic advantages of the basic norm qua fiction. In this subsection (2.2.3), I wish to highlight how my fictionalist proposal, amidst all cognitivist aspirations, still remains loyal to legal positivism, thereby also returning to a claim I made at the end of section 2.2.1.

It is indeed the specifically fictional take that aligns with legal positivism: the take on there being no objectively valid norms (*Error Theory*) but only a fiction that ensures fictional objective validity (*Legal Fiction*). In order to see how these claims provide advantages, let us consider the opposite account of a richer cognitivist project that abandons *Error Theory* and the assumption of a fiction. Such a project does not seem to be terribly attractive vis-à-vis Kelsen's legal positivism. The last thing that Kelsen should arrive at is a cognitivist account that tends towards recommending certain norms are *really* true and ought to be complied with.⁴⁸ Kelsen indeed stresses that the *Pure Theory* is not supposed to legitimise the law in any way but remain agnostic on the moral worth of the positive law.⁴⁹ And Dreier is correct when he says that it was never Kelsen's aim to hedge the arbitrariness of positive law.⁴⁹ *Error Theory* is in accordance with these claims and emphasizes that full normative necessity in law is still compatible with the utmost moral depravity of the legal system. As such, keeping *Error Theory* in place facilitates an interpretation that is carefully nuanced between cognitivist and positivist aspirations. This justifies labelling my proposal *Positive Legal Fictionalism*.

2.2.4 Summary

This section (2.2) aimed to explain how Kelsen's Pure Theory of Law can be a cognitive project after the adoption of *Error Theory*. Referring to *Positive Legal Fictionalism*, I made three claims: firstly (2.2.1), the epistemic function of a fiction can be explained according to Kelsen's metaphor of the rock-climber. Just as Fermat employed a false assumption to solve a mathematical challenge, Kelsen can use a fiction to solve a legal challenge, i. e. how to explain objective validity. Secondly (2.2.2), presupposing the ba-

⁴⁸ Most notably Kelsen, PTL1, 7, 18. (RR1, 15, 29). Kelsen, PTL2, 1, 68–69. (RR2, 21, 136–138). (Footnote 1 and 3).

⁴⁹ See Dreier, 1986, 59 (Footnote 27).

sic norm qua fiction then specifically facilitates the following epistemic advantages: it provides legal propositional knowledge and it provides legal understanding. Furthermore, it avoids complicated ontology while facilitating simple propositional semantics and leads to a particular open-mindedness in legal theorizing. Finally (2.2.3), over and above these epistemic advantages, a fictionalist account is also particularly suited to legal positivism, thereby balancing cognitive and positivist aspirations.

3. Conclusion

At the beginning of this essay, I identified two objectives: drawing attention to the *Cognitivist Challenge* as a serious challenge to Kelsen's account and proposing *Positive Legal Fictionalism* as a solution to the *Cognitivist Challenge*.

The *Cognitivist Challenge* was a challenge of how to retain Kelsen's view about the relative legal norms, i. e. that one can objectively cognise these norms, while not rejecting his view about the absolute moral norms, i. e. that one *cannot* objectively cognise these norms. I claimed that a solution to the *Cognitivist Challenge* is of vital importance for understanding Kelsen's project as a 'theory', viz. a project of objective cognition, and as a project that is 'pure', i. e. separated not only from empirical sciences but also from morality.

The solution that I proposed, *Positive Legal Fictionalism*, proceeded in two steps: firstly, relying on *Error Theory*, *Positive Legal Fictionalism* claimed that no norms are objectively valid – actually speaking. It thereby accounted for all of Kelsen's statements about certain norms, e. g. absolute moral norms, not being objects of cognition. Secondly, relying on *Legal Fiction*, *Positive Legal Fictionalism* presented the use of a fiction as the tool to facilitate objective cognition of relative legal norms. Presupposing the basic norm qua fiction invests all relative legal norms with objective validity and facilitates several epistemic advantages: legal propositional knowledge, legal understanding, realist semantics without complicated ontology, open-mindedness. These advantages form the basis of Kelsen's project of cognising the law.

Hence, Kelsen's project should be understood as a 'theory' along these fictionalist lines and considered 'pure' to the extent that the legal fiction applies only to positive legal norms and not moral norms, as well as to the extent that the fiction facilitates the genuine normative validity, which cannot be reduced to facts.

I hope to have shown that *Positive Legal Fictionalism* is also firmly rooted in Kelsen's account from an exegetical basis. However, *Positive Legal Fictionalism* is only a Kelsenian but not quite Kelsen's own account. This is because *Positive Legal Fictionalism* went beyond Kelsen's own claims by (i) applying a unified account of fictions about the law to all the different phases in his work, (ii) explaining Kelsen's claims about the method of cognising the law in terms of a fictionalist rather than a qualified Kantian framework, (iii) explicitly linking Kelsen's take on the epistemic use of fictions to Vaihinger,

and (iv) developing from the previous points specific epistemic advantages which Kelsen himself did not highlight: i. e. simple semantics without complicated ontology, open-mindedness on the basis of the distinction between acceptance and belief. Therefore, *Positive Legal Fictionalism* may be seen as a proposal for how to develop Kelsen's Pure Theory of Law further, rather than as account that merely summarises its present status.

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