ANUARIO
Nº34 · 2018

Logical skepticism in Hans Kelsen's early work

Páginas 121-146

SOCIEDAD CHILENA DE
FILOSOFIA JURIDICA Y SOCIAL

ESCEPTICISMO LÓGICO EN LOS PRIMEROS TRABAJOS DE HANS KELSEN

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RESUMEN

Este artículo amplía el estudio de la lógica en la obra de Hans Kelsen a través de la identificación de una aproximación temprana a esta disciplina en el marco de la lógica de la época moderna. Las fuentes de esta aproximación están en la recepción kelseniana del neokantismo del Baden y de la obra de Cristoph Sigwart. Con la adopción de la *Stufenbaulehre* de A. J. Merkl, Kelsen revela una actitud escéptica ante la pertinencia de la lógica para explicar la actividad judicial ordinaria.

PALABRAS CLAVE

– dualismo trascendental – dualismo metodológico – ciencia jurídica –– sistemas normativos dinámicos – lógica de la época moderna – neokantismo del Baden.

LOGICAL SKEPTICISM IN HANS KELSEN'S EARLY WORK

ABSTRACT

This article extends the study of logic in Hans Kelsen's work by the identification of an early approach to this discipline within the framework of the logic of the modern epoch. The source material for this approach can be found in Kelsen's reception of Baden Neo-Kantianism and Cristoph Sigwart's work. With the adoption of A. J. Merkl' *Stufenbaulehre*, Kelsen shows himself to be skeptical of the relevance of logic in the explanation of common judicial practice.

KEYWORDS

transcendental dualism – methodological dualism – legal science –dynamic normative systems – logic of the modern epoch – Baden Neo-Kantianism

I. KELSEN'S ATTITUDES TOWARDS LOGIC

Over the course of his vast intellectual life (1881-1973) Hans Kelsen's thought experienced several modifications, particularly in his attitude about logic and deontic logic. It is well-known that his visit to G. H. von Wright in Finland in 1952, where the author of *Deontic Logic* (1951) remembers, 'he [Kelsen] already was acquainted with my work about deontic logic and he considered that it supported his own ideas referred to «contradictions» and «voids» in law'(Bulygin, 1992: 385). This situation highlights Kelsen's interest in logic since the 1950's. The reception of these ideas is reflected in the second edition of his *Pure Theory of Law* (1960), where he held logical principles of non-contradiction and deductive inference can be only applied indirectly to legal norms, arguing that norms are not true or false due to their prescriptive character, so that there can only be logical relations among the descriptive statements about the sense of such norms (Kelsen, 1982: 88, 214, 255). However, this enthusiasm declined to the point that his late work is often characterized as displaying a 'normative irrationalism' (Weinberger, 1981: 94) or 'logical nihilism' (Bulygin, 1992: 387), which is mainly expressed in a doctrine that confines logical relations among legal norms to marginal cases, because it states that logical principles are not applicable directly, nor indirectly, nor by analogy, to relations among legal norms, since norms are the sense of acts of will (Kelsen, 1973b; 1991). Due to this shift, it is difficult to establish continuity in his work (Gianformaggio, 1994a, 1994b; Alarcón, 1989; Schmill, 1978).

Kelsen first referred to the idea that norms are not true or false in Cristoph Sigwart's work (Kelsen, 1973b; 1982: 88), and this idea was subsequently complemented by Jörgen Jörgensen and Walter Dubislav (Kelsen, 1973b). While analyzing *General Theory of Norms* (1979), Michael Hartney points out the constant references made by Kelsen to Sigwart, whose book *Logik* is 'his favourite textbook on logic' (Hartney, 1991: xiii). Hartney notices that Kelsen's knowledge about logic oscillates from one subject to another. Thus, Hartney states that Kelsen is well versed in the literature related to the logic of imperatives from the late 30's, early 40's and late 60's, but in the case of deontic logic, his opinions refers only to the points which are not dependent of formalization (Hartney, 1991: xiv). In Hartney's words, Kelsen's knowledge about logic is related to Aristotelian logic and obscure texts (Sigwart, Drews,

Bergmann and Überweg) written prior to the emergence of modern logic, thus it seems that Kelsen was uninformed about progress in the discipline (Hartney, 1991: xiv-xv). Based on these remarks it is apparent that Kelsen is located in a crossroads between two periods of logic's development: logic of the modern epoch and modern logic. A revision of his early work can shed light on this matter.

Extending the temporal scope of interest which predominates in studies about these matters in Kelsen's work, this article will circumscribe his interest to the years between 1911 and 1935, focusing on his *Habilitationsschrift*, *Main problems in Theory of Public Law* (1911), and the first edition of his *Pure Theory of Law* (1934), with the purpose of revising his constructivist phase and the Neo-Kantian period of his classic phase. For this approach, two observations were taken into consideration: One related to the history of logic, and the other related to the periodization of Kelsen's work. First, according to Tugendhat and Wolf, the logic of modern epoch (*Neuzeitliche Logik*) began with the so called *Port-Royal Logic* (1662), which highlights the predominance of psychological and epistemic concerns prior to logic concerns in a narrow sense, given that it was considered that logic had not taken a step forward since Aristotle. This period is characterized by a psychological conception of logic where the rules of logic are perceived as rules of the correct or the good thinking, Sigwart being one of his exponents. On the other hand, modern logic (*Moderne Logik*) began with Frege's *Begriffsschrift* (1879), taking interest in mathematics and looking for dissociation between specifically logical and psychological issues. This period is characterized by a linguistic conception which perceives the rules of logic as rules of language (Tugendhat & Wolf, 1997: 13-15). Second, according to Paulson's periodization, Kelsen's constructivist phase embraces the period from 1911 to 1922, considered a transition period (1913-1922) after the publication of his *Habilitationsschrift*. This phase is characterized by a program of concept formulation that is capable of explaining Law, especially Public Law. Additionally, Kelsen's classic phase goes from 1922 to 1960 and it considers two periods: a Neo-Kantian period (1922-1935) and a hybrid period (1935-1960). The classic phase is characterized by (a) a legal version of the Kantian transcendental questions and the legal knowledge as constitutive of his object of study; (b) the Basic Norm as a transcendental category applicable to the law. The Neo-Kantian period includes the first

edition of *The Pure Theory of Law* (1934) and his core ideas are (a) the self-understanding of Kelsen's doctrine as a 'Pure Theory'; (b) the attachment of Kelsen to Hermann Cohen's epistemology; (c) Kelsen's adoption of A. J. Merkl's doctrine of hierarchical structure (*Stufenbaulehre*) (Paulson, 1992; 1998a; 1998b).

It seems that Kelsen was inspired by the logic of modern epoch before the 50's because he worked directly with Sigwart's work while preparing his *Habilitationsschrift*, which influenced his distinction between acts of thought and acts of will, thus linking him to a different tradition than von Wright's deontic logic. This approach is reinforced by two different ways: First, Kelsen is influenced by Baden' Neo-Kantianism, particularly the relation between his transcendental dualism (Geog Simmel) and his methodological dualism (Wilhem Windelband and Heinrich Rickert). This reading supports the conclusion that, in a seminal way at this stage, Kelsen considered the idea of giving account for the nature of the rules of logic inside the methodological dualism without compromising the identity of legal science as an autonomous normative discipline. The second way is related to the study of law from a dynamic point of view, particularly the analysis of the judicial practice. Kelsen holds that individual norms are created because they are the product of an act of will and not an act of thought, thus they would not be an instantiation of rules of deductive inference. This reading reveals Kelsen's comprehension of judicial practice as a political activity rather than a scientific activity. In this sense, Kelsen's attitude towards logic in his late work is guided by the skeptical idea, already present in his early work, in which logical relations among legal norms have a contingent rather than a necessary character. Exploring these issues, the purpose of this article is to contribute to a better understanding of Kelsen's work, especially his late work.

II. KELSEN'S METHODOLOGICAL DUALISM IN THE CONTEXT OF BADEN NEO-KANTIANISM

Kelsen is a Neo-Kantian and this is manifested in his conception of legal science. His thought is characterized by a normativism influenced by the

Kantian distinction between *is* and *ought*, according to which norms are reducible neither to facts nor psychological phenomena (Paulson, 1992; 2003: 547). This idea coincides with his scientific claim that legal science's goal is to give account of positive legal norms and not create nor evaluate them (Kelsen, 1992: 14). Such normativism is supported by Kelsen's program and it is used to criticize his rival theories (Paulson, 1998b: 30; Wróblewski, 1981: 508-509). Thus, Kelsen characterized his proposal early on as a 'normative-formal method' for the study of law (Kelsen, 1987: 57).

Neo-Kantianism features an investigative enterprise about the *a priori* conditions of the experience in general. Inside this movement, two schools can be distinguished. One is the school of Marburg which is interested in the establishment of the *a priori* conditions of knowledge for natural sciences. The other is the school of Baden which is focused on the establishment of an appropriate method for cultural sciences (Chignell, 2008: 110-11; Beiser, 2009: 12). Even though Kelsen's affiliation with one school or the other is debatable, this is more of a qualitative issue about the most notorious influence in Kelsen's work. The reality is that he was influenced by both schools (Paulson, 2003). Thus, beyond the geographic character of this distinction (Chignell, 2008: 113), it is convenient to consider the ideas which allow a dialogue among the different members of this movement (Paulson, 2003). Kelsen adopted the transcendental dualism from Georg Simmel (Berlin) and used it as an input to move towards a methodological dualism with influences from Wilhem Windelband (Heidelberg) and his disciple Heinrich Rickert (Friburg), thus Kelsen genuinely belongs to Baden Neo-Kantianism in relation to this matter (Rickert contributions, see Section IV). This affinity is evidenced in Kelsen's *Habilitationsschrift*, and his conference *About the limits between the legal and the sociological methods* (1911), where he summarized his findings of that work. This is complemented with the *Prologue* to the reprint of *Main Problems* (1923). While the content of the book did not suffer modifications, the *Prologue* explains which ideas inspired his doctrine and how it had changed in the previous ten years. Note that both the conference and the book belong to Kelsen's early phase, despite the *Prologue* as part of his classic phase, specifically to his Neo-Kantian period.

In relation to Simmel and Windelband, Kelsen states:

> [T]he fundamental dichotomy between *Sollen* and *Sein, ought* and *is,* first discovered by Kant, so to speak, in his effort to establish the independence of theoretical reason as against practical reason, value as against reality, morality as against nature. Following Wilhelm Windelband's and Georg Simmel's interpretation of Kant, I take the 'ought' as the expression for the autonomy of the law—with the law to be determined by legal science—in contradistinction to a social 'is' that can be comprehended 'sociologically'. The *norm* qua ought-judgment, then, is contrasted with the law of nature, and the reconstructed legal norm (*Rechtssatz*), understood as a norm qua *ought*-judgment, is contrasted with the law of causality that is specific to sociology (Kelsen, 1998: 4-5).

With this conceptual apparatus, Kelsen looks to establish the singularity of studying the law, arguing that every social science has its proper methodology of study and, from this view, such methods cannot be blended because it causes confusion and an incorrect comprehension of the objects of study.[1] In his conference, he explains how the individual and general will, as objects of study, can be approached from legal science, psychology and sociology. Pleading for the normativist approach's accuracy, Kelsen discusses the treatment of the will in authors such as Jellinek in public law and Windscheid in private law, who would fall in a methodological syncretism, confusing legal issues with sociology and psychology, respectively (Kelsen, 1989).

To further establish his critique, Kelsen follows Simmel's interpretation about the Kantian distinction between *is* and *ought*, especially in his *Einleitung in die Moralwissenschaft*. The reception of Simmel's transcendental dualism is expressed in the following ideas: (a) the norms with which State regulates the relations among members of a community are different from those which regulate the relations among things in nature, because the first ones capture the sense of what ought to happen even if it does not happen (contingency)

1 After this passage, it seems more clear the affinity between Kelsen and Cohen, who states that the epistemic orientation determines the object of study (*vid*. Kelsen, 1998: 15-16).

and the second ones incorporate the sense of what happens regularly (Kelsen, 1987: 3-4); (b) *ought* is a category which assigns to the objective meaning of representations a determined function for the praxis; (c) *is* and *ought* are original categories which cannot be defined, which correspond to forms of thinking in which its differences make them appear as separate realms (Kelsen, 1987: 7; 1989: 286). It is necessary to further examine this last idea.

Even though Kelsen holds that relations between *is* and *ought* exist, and that they do not affect the independence of these realms, he does not specify their character and content. Still, Kelsen follows Simmel's idea that between *is* and *ought* exists an insurmountable abyss expressed in an opposition of logical-formal character, according to which only an *is* can justify an *is* and only an *ought* can justify an *ought* (Kelsen, 1987: 7; 1989: 286). Thus, quoting Simmel, he states 'That we *ought* something always can be proved only, if it has to be proved logically, by attributing to another *ought presupposed* as sure; considering itself, it is a primordial fact that we can question perhaps in a psychological way, but no longer in a logical way' (Kelsen, 1987: 7-8; 1989: 286-287). This idea has effects in Kelsenian understanding of deductive inference's rule since, in Pulson's words, *is* and *ought,* as basic modalities of thinking, do not present interchangeable deductive models (Paulson, 2003: 553). Here it is an implicit assumption the possible applicability of the rules of deductive inference to relations among norms and, furthermore, this application is different but analogous to the relations among judgements that represent the world. However, Kelsen did not further explore this idea in this stage.

Although Simmel's contribution is significant, his transcendental dualism is not sufficient as a methodological proposal to explain the singularity of studying law. For this additional step, Kelsen follows Windelband (Kelsen, 1989: 289, 314). In *Normen und Naturgesetze* (1882), Windelband distinguished between explanatory sciences which study the laws of necessary causal relation about the happening of things in reality, and normative sciences which study the norms that prescribe conducts about what *ought* (or not) happen hypothetically, despite it never happening effectively (contingency). Thus, normative sciences of logic, ethics and aesthetics give an account of the ideal and differentiable norms which governs consciousness to

think, want and feel, respectively. Logic studies in particular the norms that determine the links among the elements of reasoning, establishing the necessary conditions for correct reasoning, even if these are not present in the individual.[2]

As it can be seen, Simmel and Windelband had distinguished specific features about norms related to *is* (necessity) and the norms related to *ought* (contingency), but only the latter offered an explicit disciplinary distinction about explanatory and normative sciences. This context allows for the precise expression of Kelsen's objections to methodological syncretism: this method cannot produce genuine or pure knowledge because it generates judgments that are contradictory among themselves, and are mutually exclusive at a logical level (Kelsen, 1989: 314).

Thanks to these contributions, Kelsen can move forward to the characterization of the singularity of legal science as a method that studies positive legal norms by means of reconstructed legal norms (*Rechtssatz*) (Kelsen, 1998: 4). His method expresses knowledge of a system of judgments, each one of them containing a condition linked to a consequence through the imputation principle. The condition is an unlawful act and the consequence is a sanction applied by State. These elements are incorporated in a hypothetical judgment which links them through the concept of *ought*, or bindingness. As this hypothetical judgment may fulfill or not, this link is contingent and not necessary. Because of that, legal norm's validity, that is, its specific existence, is expressed in that it establishes an *ought* (Kelsen, 1987: 12-13). Due to the formulation of the legal norm as a hypothetical judgment, (Kelsen follows Wundt in order to sustain that norms also can be seen as an evaluation or comparison standard. This step makes operational the normative concept of imputation because it allows to objectively determine if a subject's action matches or not with a norm according to the rules of logic (Kelsen, 1987: 13-15 and 56-61). Therefore, hypothetical judgements express the will of the State addressed to his own behavior, and settle the foundations to Kelsen's thesis about the identification between State and Law (Kelsen, 1998: 8). It is convenient to note that Kelsen, at this stage,

2 Windelband's distinction has several sophisticated formulations in his later work, but is not possible to deepen in this opportunity.

focuses his efforts into the clarification of the notion of 'reconstructed legal norm' and does not propose an explicit concept of 'legal norm'. This later step is supported by Rickert's contribution.

III. KELSEN IN THE CONTEXT OF LOGIC OF MODERN EPOCH

Within logic of modern epoch framework and considering the works of Simmel, Windelband and, especially, Sigwart (Paulson, 2003: 561-563; Chignell, 2008: 117; and Beiser, 2009: 11-18),[3] Kelsen adopts in his work the following ideas: (i) logic is a normative discipline related to psychology but not mistakable with; (ii) logic is a formal discipline which studies judgements and reasoning; (iii) these judgements are the product of reasoning, which specifically consists in performing an internal activity of the thinking process. This third idea (iii) will be reviewed in the next section.

In *Main Problems*, Kelsen regularly draws upon the third edition of Sigwart's *Logik* in order to defend the autonomy of legal method against teleological and psychological methods. Context, content and reception of Sigwart's work will be explained as follows. The 'psychologism' label was used frequently in Germany and Austria between 1866-1930 so as to identify different approaches to logic linked to rising psychology. Although various authors such as Gottlob Frege and Edmund Husserl opposed 'psychologism' as a whole, it was not a unified movement. While some exponents adopted a reductivist position holding that logic was a sub-discipline inside psychology, Sigwart adopted a normativist position claiming that logic was an autonomous discipline related to psychology which studies the rules that determine the necessary conditions for thinking correctly and improve the performance of this activity (Kusch, 1995: 76-80; Picardi, 1997: 162-182). According to Sigwart, logic is a normative discipline, which aims at being not a physics but an ethics of thinking (Sigwart, 1903, i: 22).

3 Additionally, Kelsen draws upon occasionally with similar purposes to Wilhelm Wundt - quoting his works *Ethik* and *Grundriss der Psychologie*. According to Kinzel, Wundt has a normativist conception of logic, the same as Windelband and Sigwart, therefore he can be considered as a complementary author to the thesis of this section (Kinzel, 2017: 90).

Sigwart's capital work, *Logik*, was the product of hard work that spans various editions. Katherina Kinzel identifies Sigwart's core thesis which can be stated as follows: (a) truth is a feature of judgements that are made in empirical consciousness; therefore, truth is always *truth for* an empirical consciousness; (b) truth recognition and the logical principles that allows it to rest on a sense of certainty that is provided from both of them; (iii) the enterprise for a normative logic formulation depends on the availability of logical rules and a will to form and assert true judgments and the historical and social conditions where natural thinking has place; (iv) this volitional thinking which follows logical rules is meaningful only against the background of our fallible natural thinking (Kinzel, 2017: 90).

According to Sigwart, logic's object of study is the formal-objective truth, which can be attached to assertions whose purpose is being universally and necessarily endorsed. Therefore, it consists of an inquiry of the general conditions and rules which every proposition must fulfill in order to be universally and necessarily valid, considering the nature of thinking (Sigwart, 1903, i: 10-11). The formal nature of logic allows within its scope of investigation the purely arbitrary premises whose validity derives from the will as in the case of judicial practice (Sigwart, 1903, i: 14). Furthermore, its end is to improve the internal activity of producing true judgements starting from a determined context' social and historical conditions and without exciting the senses or producing immediate effects in the will and behavior of oneself or others (Sigwart, 1903, i: 1-2 and 27). Even though Sigwart's formal logic shows an expansive attitude, it is only interested in propositions linked to a truth content and, since he conceives thinking as an activity, he privileges pragmatic and semantics aspects of propositions, excluding their syntactic aspects. It is expressed in Sigwart's claim of logic's interest are assertions, that is to say, communications whose goal is to establish propositions that are true, a feature absent in imperatives. Although imperatives are communications the goal of which is to establish a command that others should obey, as when an authority commands a behavior to a subject which is the State's dynamics of commanding by way of laws given to its citizens (Sigwart, 1903, i: 18-19). Primarily, to differentiate assertions from imperatives it should be considered the communicative fact's function because the solely grammatical expression is not always sufficient

as a distinctive criterion. Thus, the expression 'you may' (*du darfst*) has an ambiguous character, since it is not possible to determine if it is an assertion or an imperative–for instance: 'you may close the door.

Frederick Beiser relates the reception of Sigwart's ideas in Windelband's thought, who sympathizes with the understanding of the rules of logic as ideal norms for the guiding of empirical consciousness. In *Zur Logik* (1874), Windelband reviews the first volume of *Logik* and expresses his endorsement to an understanding of formal logic as an autonomous discipline distinguishable from psychology and metaphysics, adding at the time that logic operates under a normative concept of truth which establishes the necessary rules for the ends of knowledge. Later, in *Die Erkenntnislehre unter dem volkerpsychologischen Gesichtspunkte* (1875), Windelband argues that the norms of logic are a historical and cultural product whose sense cannot be comprehended without reference to any kind of psychology, because if there was no thought they would lose their purpose and object (Beiser, 2014: 520-521; also Kinzel, 2017: 88).

The previous exposition presents a background to better understand Kelsen's criticism of methodological syncretism. In the first line of his *Main Problems*, Kelsen holds 'To investigate the legal norm theory, it is necessary to start from the exposition of those specific and peculiar relations that exist among this concept and others of analogous nature' (Kelsen, 1987: 3). Afterwards, Kelsen develops an argumentative strategy oriented by a characterization of legal science through its contrast with other disciplines. Thus subscribing to Windelband's distinction between explanatory and normative sciences, Kelsen conceives explicitly as normative sciences to legal science, ethics, logics, grammar and aesthetics (Kelsen, 1987: 5-6; 1989: 289). They are characterized as those that study human behavior which can be qualified with conformity or disconformity in relation to certain norms (Kelsen, 1987: 11). Therefore, following Windelband and Sigwart, Kelsen states that norms enable the evaluation of the way in which the judgements inspired by these norms are related to reality, assessing their conformity or disconformity (Kelsen, 1987: 19-20). Even though Kelsen has a major interest in distinguishing legal science from ethics, at the same time he follows the tradition so as to characterize logic as formal logic because, following Simmel, he claims that to study *ought*, in a rigorous logical sense,

should not be identified with any content of *is*; therefore, as will is a real, psychological process which belongs to the realm of *is*, it cannot be treated as an *ought*, as neither the acts (Kelsen, 1987: 9). Moreover, the formal character of *ought* provided by a logical point of view is important for legal science, but not for psychology. Then Kelsen adds:

> But, all these process of will, all of these acts do not constitute an *ought*–in the logic-formal sense of the word–, but only an *is*, an effective happening, psychic or physic; they are, certainly, an *ought* content but they are not this *ought* itself, which is never a content but a form (Kelsen, 1987: 9).

As part of his inquiry into the accurate formulation of *ought*, Kelsen considers–without quoting–Sigwart's remarks about the limitations of adopting a syntactic view which were exposed before in this article. Kelsen notes that expressions of the kind 'you may…' are ambiguous due to the fact that they can correspond to a hypothetical judgement as well as an imperative, adding that these expressions can fulfill a declarative function, giving account of the existence of an *ought*, as well as a constitutive function establishing an *ought* (Kelsen, 1987: 60). However, Kelsen is not an uncritical receptor of Sigwart. First, Sigwart recognized 'communicative functions' to expressions, but Kelsen departs from this position because he excludes the notion of 'end' as the distinctive feature of legal norms (Kelsen, 1987: 61). Second, Sigwart states the possibility of considering the establishment of a norm as the end of an act, but Kelsen rejects this idea arguing that this thesis confuses to want something as the content of an *ought* with norm which constitutes this *ought* (Kelsen, 1987: 58-59). Still, the core affinity between both authors is showed in Kelsen's assertion that the normative-formal method does not inquire into the content of legal norms but their form, studying in what way the norm expresses its *ought* (Kelsen, 1989: 59). Precisely, this formal interest is shared with Sigwart's formal logic as distinguishable from psychology.

As it will be reviewed briefly in the following section, Kelsen shows a special study of Sigwart's work and uses it mainly to differentiate the normative-formal method from the teleological and the psychological methods, which

core notions are ‘end’ and ‘will’. Kelsen’s core thesis is that for legal science, using the normative-formal method, the State’s will is a bundle of imputation like that of a legal personhood (Kelsen, 1989: 158).

Firstly, Kelsen follows Sigwart to state that the psychological concept of end corresponds to the representation of a state of oneself or affairs, to which will is oriented (Kelsen, 1989: 49). From this perspective, means are proposed as causally oriented activities to fulfill these ends. Kelsen’s main critique of Stammler’s teleological method is based in Sigwart’s asseveration according to which the concept of end is not opposed to causality, but causality includes end (Kelsen, 1989: 49). Thus, Kelsen argues that when a norm establishes a behavior as an *ought*, this norm has an end, not establishing this *ought* as an end but as a mean to an end when it influences individuals to accomplish such behavior (Kelsen, 1989: 58). In summary, insofar as the will and his ends belong to the realm of *is*, to consider a norm as a means to an end confines its understanding to this realm and impedes the study of it as an *ought*. Secondly, Kelsen draws upon Sigwart to argue that psychology has the individual will as its object of study, in other words, volition and not the will in general so it is not a useful concept to study State’s will (Kelsen, 1989: 92). From this premise, Kelsen criticizes various authors dedicated to criminal and civil law. Some of them even are acquainted with Sigwart’s work. Thus, Kelsen rejects the positions of Zitelmann, Becker y Feuerbach, who hold that imputation is a causal and psychological concept and, at the same time, deny the possibility of a normative concept of imputation (Kelsen, 1989: 97-101). Then, Kelsen discusses particular features of the theories of Zitelmann and Hold von Ferneck. On the one hand, Kelsen follows Sigwart to criticize Zitelmann’s concept of unconscious will and his concept of imperative in order to show the difficulties of adopting a psychological concept of will for legal scientific purposes (Kelsen, 1989: 125, 225, 131-133). On the other hand, Kelsen follows Sigwart to criticize Hold von Ferneck’s concept of subjective right (Kelsen, 1989: 586-587).

Kelsen’s formulation of legal science as a formal normative science links itself closely to formal logic proposed by Simmel, Windelband and Sigwart, showing its relation to Baden Neo-Kantism and the logic of the modern epoch.

IV. THE ENCOUNTER BETWEEN LOGIC OF THE MODERN EPOCH AND THE *STUFENBAULEHRE*

This section reviews Kelsen's adoption of *Stufenbaulehre* in his *Prologue* to the reprint of his *Capital Problems* and in the first edition of his *Pure Theory of Law*, paying attention to its effects in his attitude towards logic. These works belong to the Neo-Kantian period of his classic phase. In this context, pending issues such as Rickert's influence will be developed along with the idea (iii) posited in the previous section that referred to the distinction between acts of thinking and acts of will.

Between 1916 and 1923, Kelsen adopted Adolf Julius Merkl's doctrine of hierarchical structure (*Stufenbaulehre*), according to which law regulates its own creation, and he reinforced his criticisms of the idea that legal knowledge is focused in general norms only (Kelsen, 1998: 13). In his *Main Problems*, Kelsen held that legal system, as a product of State's will which is understood to be an object of reconstructed legal norms, appears as an aggregate of general norms and also of an individual State's enforcement acts (judicial and administrative). This characterization already has skeptical features. He stated that enforcement acts cannot be logically deduced from general abstract norms because the firsts have contentual elements that the latter does not determine and cannot completely determine (Kelsen, 1998: 11 and 13). In this sense, 'The necessity, for the act of enforcement, of a legal determination by the general norm is tied to the unavoidability of discretion' (Kelsen, 1998: 11). According to Kelsen, these concrete acts also contain the same State's will which appears in abstract norms, and despite the fact that abstract norms' content could be overwhelmed, they should be the object of study for reconstructed legal norms (Kelsen, 1998: 11).

Precisely because it is liable to become overwhelm, the unity of a legal system cannot rely only in the content of legal norms, that is, a static criterion. It is impossible for Kelsen to conceive the legal system as a deductive system containing a set of basic propositions (Constitution, general norms, axioms, etc.) from which necessary conditions could be inferred. As a consequence, the unity of legal system follows a different path:

Here, clearly, a dynamic point of view must assert that the sought-after unity can only be the *unity of a rule of creation;* law creation itself, as a legally relevant material fact, must be understood as the content of a reconstructed legal norm (Kelsen, 1998: 12).

This quote is significant because it shows the relations between the doctrine of hierarchical structure and transcendental dualism. According to *Stufenbaulehre*, law regulates its own creation through empowering norms. Thus, each legal norm is created according to a procedure established in a norm with a higher hierarchy and abstraction, being observed thus a process of creation from abstract to concrete. In this context, the legal norm's act of creation is also an act of application of another norm with a higher hierarchy, which is the core of Kelsen's thesis about the relativity of application and creation of law (Kelsen, 1998: 13-14). It should be clarified that Kelsen already conceives Basic Norm as a presupposed norm insofar as it is a rule of creation (Kelsen, 1998: 13).

It is important to notice that the act of creation/application, as a material fact, belongs to the realm of *is,* despite the involved legal norms which belongs to the realm of *ought*. So as they belong to different realms, they cannot be logically compatible if one remembers the thesis exposed in *Main Problems*. To relate these elements, Kelsen introduces a semantic characterization of legal norm in the first edition of *Pure Theory of Law*. Kelsen claims that if legal science's goal is knowledge of legal norms and not their creation or application, then '[t]he problem of the Pure Theory of Law is the specific autonomy of a realm of meaning' (Kelsen, 1992: 14).

In Kelsen's view, the problem of the auto-generation of the normative is related to natural facts, but it cannot be proved only by them because assertions related to legality–'it belongs to you', 'that is a crime', etc.–would be meaningless (Kelsen, 1992: 33). Legal science is addressed to norms which give the legal or illegal character to material facts and these norms are created through material facts to which other norms conferred the norm character (Kelsen, 1992: 11). According to Paulson, this is the moment when Kelsen draws upon Rickert, linking him more closely to Baden Neo-Kantianism. Rickert was interested in setting up a methodology for cultural sciences (*Kulturwissenschaft*) which he considers essentially evaluative.

Considering the supposed insurmountable abyss between *is* and *ought*, from Rickert's view the problem is how it is possible to perform a value judgement if that supposedly links a value with a fact or an object. In his *System der Philosophie*, Rickert proposed the existence of three distinct realms: First, the realm of ideal values and, second, the realm of objects in reality. Both realms are conceptually opposed and they correspond to the spheres of *ought* and *is*, respectively. Additionally, there would exist a third realm, specifically, a border realm with a link function. Rickert adopts a semantic approach in which he offers a tripartite distinction between an act and the senses which integrate the meaning of its content. Acts are psychological phenomena which possess a logical meaning. Concurrently, this logical meaning has a subjective sense and an objective sense. Although the first is directed to the sense of this act, the second is directed to the object produced by it which has a sense *for itself*. Therefore, the psychological act belongs to the realm of *is* and its subjective sense belongs to the realm of *ought*, at the same time as its objective or immanent sense belongs to the border realm, fulfilling its linkage function (Paulson, 2003: 564-567; also Beiser, 2009: 20-25). In conclusion, this border realm allows for the existence of the objective value judgements needed by culture sciences.

In his last works, Kelsen recognized in Rickert's writings the merit of showing the distinction between an act and its meaning (Kelsen, 1973a: 222). Although Rickert's distinction is focused on the act in which an object is valued and the value which is its sense, Kelsen's distinction is related to the act whose meaning is a norm–the norm positing act–and the norm which is its sense. It is expressed in Kelsen's position that external human behaviors happen in the sensible world–governed by natural laws–and additionally have an immanent sense which, concurrently, has attached a subjective and an objective sense (Kelsen, 1992: 8-10). It is noticeable that both senses may coincide or not, so they are contingent. According to Kelsen, the subjective sense is the attribution of meaning which a subject gives to its own act, while the objective sense is an attribution of meaning to the act from the content of a norm (Kelsen, 1992: 9-10). Thus, Kelsen states that a norm is a category, specifically a scheme of interpretation, and that the norm itself is created by a legal act, whose own sense comes from another norm at the time (Kelsen, 1992: 10). Therefore, norm creation is always making reference to the material events whose content is the content

of a given norm (Kelsen, 1992: 11). However, law's normative meaning does not necessarily obey an interpretation, but a possible interpretation under certain conditions, specifically, under a presupposed Basic Norm (Kelsen, 1992: 34).

As a result, the question for which the Basic Norm is the answer is closely related to the understanding of law as a dynamic system of legal norms. Kelsen asks how it is possible to explain the unity of a plurality of legal norms, and how it is possible that a legal norm belongs to a legal system (Kelsen, 1992: 55). This is precisely the moment when Simmel's thesis of inferential logical relations among norms implicitly reappears.

According to Kelsen, legal norm's validity corresponds to its specific existence as a constituent of a legal system (Kelsen, 1992: 12 and 57).[4] In this sense, a plurality of norms forms a unity when the validity of every one of them can be traced back to a single norm as the ultimate basis of their validity, establishing a chain of validity which links specific principles, which depends on the normative system in question. In static normative systems, such as the morality, the principle of validity is settled in the norms' content, which is obtained by tracing back a deductive chain established by acts of intellect that range from general to particular. Thus, the content of every norm in static normative systems is necessarily integrated in its Basic Norm's content, so it has a static and substantive character–for instance, from the Basic Norm 'love thy neighbour', one can derive the norm 'you shall help those in need' (Kelsen, 1992: 55-56). On the other hand, in dynamic normative systems, as the law, norms validity is expressed in being created in a certain way. Thus, the principle is settled by tracing back a chain of creation established by acts of will. Therefore, the Basic Norm in a dynamic normative system establishes the first procedure for creating new norms, which highlights its dynamic formal character–the Basic Norm in law is the first Constitution historically established (Kelsen, 1992: 56). In this last case, the Basic Norm is a transcendental logical condition presupposed for the creation of norms and for the interpretation of material facts as norms (Kelsen, 1992: 58).

4 As Paulson remarks, in this stage there is not a link between validity and bindingness (Paulson, 1998c: 165).

This reading supports the notion that, according to Kelsen, the distinctive feature of positive law is to be a product of human will's acts, which do not necessarily obey the rules of logic. Therefore, legal science studies positive law as historically located phenomenon. On the contrary, Kelsen adopts an *a priori* approach in order to investigate the norms of a moral system given a certain Basic Norm–whose content may be indifferently settled by divine will, nature, or pure reason. Moreover, this inquiry represents the intellectual activity of inferential character, which is precisely to understand reasoning as an activity inside the framework of logic of the modern epoch. At this point, it is important to notice that Simmel's thesis about logical relations among norms is drawn upon by Kelsen in a limited way, making it applicable only to moral and not to law, revealing Kelsen's skepticism. However, even to endorse this limited thesis, Kelsen departs from Sigwart's proposal about a normative formal logic just applicable to assertions. Still, it is an open issue to which Kelsen returned in his latest works, as demonstrated in the introduction. Finally, the last topic for this work is related to the distinction between legal science and judicial practice. The following remarks will also support Kelsen's affinity to logic of modern epoch.

In the context of law creation, Kelsen characterizes the –condemnatory– judicial decision as an act of will, which links the facts of the case and the applicable general law through the creation of an individual norm (Kelsen, 1992: 11-12). Due to the fact that this link has been created by an act of will, it did not exist before. For this reason, the judicial function is instead constitutive rather than declarative (Kelsen, 1992: 67-68). This idea was expressed before in his *Main Problems,* as it is has been seen before, but also in his conference. At the time of characterizing normative disciplines while discussing methodological syncretism, Kelsen extended his critique to functional syncretism. Kelsen uses an obscure language, and apparently distinguishes between functions of consciousness. On the one hand, he distinguishes a function of thinking the performance of which corresponds to an activity oriented to norms of cognition–as studying a positive norm–, on the other hand he distinguishes a function of will which performance corresponds to an activity oriented of positing norms in an authoritative way in order to influence another subject's behavior– as in the case of legislation (Kelsen, 1989: 290). This distinction inspires Kelsen's opposition to the jurisprudence of concepts insofar as the Pure Theory is against the view

that legal norms could be created by the way of cognition (Kelsen, 1992: 84), moreover Pure Theory recognizes that legal norms cannot be created by intellectual acts but through acts of will (Kelsen, 1992: 55).

The demarcation between scientific activity and judicial practice is also expressed in the case of interpretation. The activity of norm application often challenges an unclear sense of a law or that the letter of a law does not coincide with legislator's will– what it is said does not coincide with what was intended to have been said–, but positive law has no foolproof method to resolve these problems (Kelsen, 1992: 77-81). In this context, Kelsen states that legal science interpretation is an act of thinking because it investigates and shows the different possible interpretations of a general norm. On the other hand, judicial interpretation primarily is an act of will because it investigates the possible interpretations of a general norm but also chooses one of them, guided by ethic or social considerations, so as to decide a particular case through the creation of an individual norm (Kelsen, 1992: 83).[5] As a result, legal science has truth as its standard but the Pure Theory abstains from setting a standard for judicial practice because it is a task for ethics or politics instead of science.

V. FINAL REMARKS

As stated before, the inclusion of Kelsen in the movement of logic in the modern epoch is supported by his Baden Neo-Kantian roots. Essentially, Kelsen's logical skepticism relies in the possibility of content overflowing general norms at the moment of creation of individual norms, that is to say, things were not as it *is* supposed they *ought to be*.

Kelsen's attitude has detractors like Eugenio Bulygin who holds a deductivist theory. Bulygin bases his position in Tarski's concept of *system*, according to which a system is a finite set of propositions with all its consequences (Alchourrón & Bulygin, 1998: 83 and 86). Therefore, Bulygin argues that when a judge deduces the solution for a particular case, considering a

5 According to Kelsen, the situation of judicial practice is the same of legislator with a quantitative difference because the second has a wider room to discretion.

general norm and the facts of the case, he does not create a new norm because the individual norm is already contented in the system, even if the established decision creates a new legal situation (Bulygin, 1991).

However, in Kelsen's defence it is possible to see that a position like Bulygin's cannot properly distinguish judicial practice from legal studies. As an act of thinking, legal science can only describe reality, which is formed by human decisions, and sometimes those decisions are logically unintelligible. Even though one can trust in tribunals, the judges could hold contradictory propositions which accredit and discredit, at the same time, the conditions of application of a certain norm that decides a case.[6] Thus, logical properties are contingent in dynamic law.

6 Vid. Supreme Court of Chile Decision 4263-2011 (http://www.pjud.cl).

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