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Kantianism and Neo-Kantianism as a Philosophical Provenance of Intellectual Assumptions in the Concept of the Grundnorm by Hans Kelsen

Keywords: Kantianism and Neo-kantianism, Hans Kelsen, legal normativism, legal nature of the *Grundnorm*, philosophy of law
Słowa kluczowe: Kantyzm I neokantyzm, Hans Kelsen, normatywizm prawny, charakter prawny normy podstawowej, filozofia prawa

Abstract

The subject of the elaboration is kantianism and Neo-kantianism as a philosophical provenance of intellectual assumptions in the concept of the *Grundnorm* by Hans Kelsen. In the beginning this text presents an introduction to the research analysis. An important legal issue is the *Grundnorm* in the structure of legal standards. These reflections are based on eighteenth and nineteenth century philosophies, such as Kant's metaphysics and Cohen's formalism. The above arguments are relevant for the science in the concept of the *Grundnorm* by Hans Kelsen. The text uses foreign literature. The article contains a short summary.

Streszczenie

Kantyzm i neokantyzm jako filozoficzna proweniencja intelektualnych założeń w koncepcji normy podstawowej Hansa Kelsena

Przedmiotem opracowania jest kantyzm i neokantyzm jako filozoficzna proweniencja intelektualnych założeń w koncepcji normy podstawowej Hansa Kelsena. Na początku

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niniejszy tekst prezentuje wprowadzenie do analizy badań. Ważną kwestią prawną jest norma podstawowa w strukturze norm prawnych. Refleksje te opierają się na filozofiach XVIII i XIX wieku, takich jak metafizyka Kanta i formalizm Cohena. Powyższe argumenty są relewantne dla nauki zawartej w koncepcji normy podstawowej Hansa Kelsena. Tekst wykorzystuje literaturę zagraniczną. Artykuł zawiera krótkie podsumowanie.

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I. Introduction to the research analysis

Knowledge has always been one of the main values for human beings and has provided a lot of research possibilities. Hence, we are obligated to remember that choosing a research subject is not easy. Putting forward thoughts for consideration often requires a far-reaching ability to concentrate and focus as well as an extraordinary imagination that can grasp phenomena of the surrounding world. There is no doubt that the inquiry of jurisprudence and philosophy is a passionate work. It gives a lot of satisfaction. The crucial fact is that besides the essential knowledge it's also necessary to demonstrate the precise ability of perception, which is sometimes not so easy.

There are still many unclear issues in the science of law. These include Hans Kelsen's concepts, which are known all over the world. His pure theory of law and the legal nature of the basic norm are incomprehensible. This philosopher is one of the most important representatives of the science of law in the 20th century. He contributed to the development of international law and the concept of legal normativism. Kelsenism developed significantly in Germany and Italy[2].

J. Raz gave an opinion that: "of all the various doctrines of Kelsen's legal philosophy it was his theory of the basic norm that succeeded most in attracting attention and capturing the imagination. It acquired enthusiastic devotees as well as confirmed opponents. Both admirers and critics owe much to

[2] N. Bobbio, D. Zolo, *Hans Kelsen, the Theory of Law and the International Legal System: A Talk*, "European Journal of International law" 1998, No. 9; similarly: D. Zolo, N. Bibbio, *l'alito della libertà e i rischi della democrazia*, "Iride: Filosophia e Discussione Pubblica" 2004, vol. 17.

the obscure way in which Kelsen explains his theory. The obscurity was criticized and led people to suspect that the whole theory is a myth"[3].

The aim of this article is to present the influence idealistic philosophical trends on the concept of the *Grundnorm* by Hans Kelsen, mainly the philosophy of Kant, Cohen and Hegel. They were the basis of Kelsen's research analysis. An important research intention is also to show that Kelsen's conceptions could become an element of fascism and Nazism. For this reason, it is necessary to the analysis of this problem be carried out again. It must be said that new scientific research in this field is important because it could contribute to demonstrating new aspects of philosophical and legal.

II. Idealistic philosophy on the concepts of Hans Kelsen

Idealistic philosophy is the first element connecting the views of Kant, Hegel and Herman Coher1. It should be underlined that these philosophers recognized a logical vision of reality. The logic has become part of analytic philosophy.

P. Guyer and A.W. Wood for Kant emphasized that: "General logic is constructed on a plan that corresponds quite precisely with the division of the higher fa culties of cognition. These are: understanding, the power of judgment, and reason. In its analytic that doctrine accordingly deals with concepts, judgments, and inferences, corresponding exactly to the functions and the order of those powers of A 131 mind, which are comprehended under the broad designation of understanding in general"[4].

M.S. Green, in turn, noticed that: "In response to empiricist trends in the philosophy of law that had made legal meanings look scientifically disreputable, Kelsen sought to save the logical analysis of legal systems by adopting a Kantian epistemology of legal meaning (…) Kelsen speaks of understanding a legal system in terms of assigning "legal meanings" to "external manifestation[s] of human conduct": People assemble in a hall, they give speeches, some rise, others remain seated – this is the external event. Its meaning:

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[3] J. Raz, *Kelsen's Theory of the Basic Norm,* "American Journal of Jurisprudence" 1974, vol. 19, p. 94.

[4] I. Kant, *Critique of Pure Reason,* in translate: P. Guyer and A.W. Wood, Cambridge 1998, p. 267.

that a statute is enacted. Or, a man dressed in robes says certain words from a platform, addressing someone standing before him. This external event has as its meaning a judicial decision. A merchant writes a certain letter to another merchant, who writes back in reply. This means they have entered into a contract. An individual somehow acts to bring about the death of another, and this means, legally speaking, murder (…) an important aspect of Kelsen's logic of legal systems is his reduction of all legal meaning to the conditions for appropriate coercive sanctions by officials. The difference between the legal meaning of my petting my cat and the legal meaning of my intentionally killing another person is that the former is not sanctionable, while the latter is. For Kelsen, therefore, legal interpretation of social events takes place in the following manner: What is legally interpreted – the legal sentence – is a string of social events reaching back into the past. The individual events within this string provide primitive legal meaning, which is similar to the primitive linguistic meaning associated with words in language. Just as words give languages content, the legal meanings of individual social events give legal systems content by determining what is authorized and commanded"[5].

It is not difficult to see that Kelsen's theories are based on the logic of Hermann Cohen. The analytical philosophy proposed by the scientist was an example of strong rationalism and deep formalism.

H. Wiedebach underlined that: "Cohen thematizes his logic of origin twice: once as a principle of scientific knowledge of nature, in his Logic, and once as the foundation of a religious concept of nature, i.e., of nature as the Creation of God"[6].

Generally speaking, it should be noted that Kelsenism used toon the assumptions of Kantianism and Neo-Kantianism. Hans Kelsen's *Pure Theory of Law* was significantly was based on Kant's *Critique of Pure Reason* and Hermann Cohen's *Logic of Pure Knowledge*. Kelsen's understanding of a law strongly determined by formal logic was reminded of Kant's tendency to perceive reality only through reason. This philosophers had an analogous under-

[5] M.S. Green, *Hans Helsen and the logic of legal system*, "Alabama Law Review" 2003, vol. 54, No. 2, p. 368–379.

[6] H. Wiedebach, *Logic of science vs, theory of creation: The Authority of annihilation on Hermann Cohen's logic of origin*, "The Journal of Jewish Thought and Philosophy" 2010, vol. 18, p. 109.

standing of the concepts of: *transcenden (in metaphysics)* and *transcendent (in theory)*. They separated being (Sein) from (Solen) duty. Thus, the obligation has become a *strictly* normative concept for Kelsen. Here, the science of law is a normative study classified as a matter of obligation, outside the area of being. Kant's pure reason appeared in Kelsen's pure theory of law. More formally was philosophy Hermann Cohen[7], who for Kelsen's theory was a model of all rationality, creating concepts and meanings based on purely rational knowledge, goes even further in the direction of rationality. The knowledge for Cohen cannot be based on experience, but remained rational knowledge. Cohen's ethics was reduced to the logic of duty. In this way, Kelsen created the foundation of his own legal theory.

It should be emphasized that Kelsen's theory of law used of the assumptions of Hegelian absolute idealism. Here a logic developed which reduced the cognition of reality to a triad: thesis, synthesis and antithesis.

F. Yuhua noted that: "one of Hegel's famous viewpoints is that, any development is experiencing the three stages of thesis, antithesis, and synthesis; namely, the starting point for the development (thesis), the opposite is appeared (antithesis), and the negation again (synthesis). This means that, antithesis negates thesis, synthesis negates antithesis, and synthesis is the Negation of Negation"[8].

III. The legal nature of the *Grundnorm* in the concept of Hans Kelsen

Many scientists have discussed Kelsen's views in the area of law philosophy. K. Frew noted that: "Kelsen based his pure theory of law, not on sociological considerations, but on the strict science of law itself. His pure theory reflects Kant's transcendental argument on legal cognition without adopting Kant's moral or legal philosophy. In applying the transcendental argument, Kelsen adopts a neo-Kantian or regressive version of Kant's theory which assumes that one already has knowledge or cognition of legal propositions. This as-

[7] G. Edel, *The Hypothesis of the Basic orm: Hans Kelsen and Hermann Cohen,* [in:] *Normativity and Norms: Critical Perspectivies on Kelsenian Themes,* ed. S. Paulson, Oxford 1998.

[8] https://www.researchgate.net/publication/285580627_Expanding_Hegelian_Triad_Thesis_Antithesis_Synthesis_with_Neutrosophy_and_Quad-stage_Method (10.08.2020).

sumption forms the basis of the validity of Kelsen's system of norms, supported by the presupposition of the category of normative imputation, i.e. the link between legal condition and legal consequence. As his critics point out, Kelsen does not provide clarification as to why these norms are valid, but relies instead on his 'ought' proposition (acting as a categorical imperative to obey authority) to justify the validity of the basic or ultimate norm"[9].

Legal issues in the area of pure theory of law provide an opportunity for further research on the *Grundnorm* present in the concept of Hans Kelsen. The mentioned sphere of reflection marks a very interesting field for scientific research because it makes it possible to show the directions of a new thought grounded in legal normativism, The author suggests that the *Grundnorm* was created in the context of Kant's metaphysics because of its logical and transcendental construction that binds the legal system in a hierarchical way. The *Grundnorm* would be, in that case, an invisible structure that holds the whole system of positive law.

V. Čyras, F. Lachmayer, G. Tsuno noted that: "Kelsen provides the example of the basic norm of Christian morality and holds that "only a norm can be the reason for the validity of another norm": It is a 'basic' norm, because nothing further can be asked about the reason for its validity, since it is not a posited norm but a presupposed norm"[10.]

B.H. Bix underlined that: "the Basic Norm is presupposed when a citizen chooses to read the actions of legal officials in a normative way. In this Kelsenian approach, all normative systems are structurally and logically similar, but each normative system is independent of every other system – thus, law is, in this sense, conceptually separate from morality"[11].

J. Cohen emphasized that: "Kelsen excludes custom, morality, and community expectations from the explicit tests for legal validity in part because he hopes to avoid the danger of massive disobedience to law in the name of more fundamental obligations"[12].

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[9] K. Frew, *Hans Kelsen's theory and the kay to his normativist dimension*, "The Western Australian Jurist" 2013, vol. 4. p. 293.

[10] V. Čyras, F. Lachmayer, G. Tsuno, *Visualization of Hans Kelsen's Pure Theory of Law*, [in:] *Proceedings of FCASL*, eds. H. Yoshino, M. Araszkiewicz, V.R.Walker, Vienna 2011, p. 11.

[11] B.H. Bix, *Kelsen, Hart and legal normativity*, "Revus Journal for Constitutional Theory and Philosophy of Law / Revija za ustavno teorijo in filozofijo prava" 2018, No. 34, p. 1.

[12] J. Cohen, *The Political Element in Legal Theory: A Look at Kelsen's Pure Theory*, "The Yale Law Journal" 1978, vol. 88, N o. 1 p. 14.

When undertaking an analysis in the area of legal normativism, we must, at the very beginning acknowledge that there is a relation between the *Grundnorm* and metaphysics. Hans Kelsen drew his assumptions from Kant's metaphysics, so it seems right to assume that we should be able to find foundations for the author's scientific discourse in transcendental metaphysics. In Hans Kelsen's opinion, metaphysics separates itself from positive law but it stays present in the process of the ontological existence of positive law norms justification. Because of that, the transcendental conditions of the *Grundnorm* are derived from Kant's metaphysics, which is indirectly present in the content of legal norms. In regard to the *Grundnorm* we must notice that even Kelsen himself was not able to explain its origin. Neither was he able to describe the precise causes that kept it in force.

On the ground of legal science, the *Grundnorm* is classified into the range of metaphysical notions as a metanorm. Notwithstanding the above arguments we can state that in the ontological aspect it shows the character of a legal being that is based on the level of transcendental metaphysics. In other words, besides its transcendental meaning present in the field of Kant's metaphysics, it has strong ontological determinants that allow the progress of scientific research in the direction of demonstrating the nature of the *Grundnorm* in the perspective of the sources of its origin, establishing, effectiveness – coming into force and being repealed. A further investigation would allow us to prove that in the field of legal ontology, a change of a political system will cause a change of the *Grundnorm*.

But here it needs to be pointed out that the current hierarchy of legal norms with acknowledging the existence of the *Grundnorm* as the meta-constitution leads us to some fundamental reflections. The first one is about the factual (extrajudical) derogating force which the Grundnorm has. But the mentioned factual repeal force is established only in the case of a forced political system change which is not accepted by the society in its new form. It seems that the *Grundnorm* would change along with the political system and would be effectively in force only when the new legal and political order is accepted by the citizens. In other case the existence of a changed *Grundnorm* will become a fact, but the new legal and political solutions would become a law that is avoided and ignored by the society of a given country. The big role is

played by the cultural attitude of the citizens of a given country and their attitude toward obeying their legal norms.

There is a difference between how a new system or new solutions would be accepted by Latin and Bizantine civilizations. As an Austrian, Hans Kelsen developed his analysis in his own country, which cannot be denied its importance when we look at his conclusions about the form of the then existing *Grundnorm*. Legalism which has arisen in the cultural and historical context of a specific country reinforces and legitimizes a changed *Grundnorm* and the legal opportunism often throws into question its effectiveness.

We cannot also marginalize the fact that the ontological and philosophical view on the *Grundnorm* allows to move the problem analysis from transcendental metaphysics to the field of ontology It seems accurate to presume that the *Grundnorm* as the fundament of a legal system becomes a part of positive law. It has to participate in the content of positive law even though it is not a positive law itself. It seems that this relation speaks in favour of looking at the *Grundnorm* from an ontological perspective. It is important to look for an existence of the *Grundnorm* that demonstrates itself in the application of the act of specification of a lower level norm (of positive law) by a higher level norm (*Grundnorm*) in the syllogistic model of inference. Moving and transforming the *Grundnorm* into a legal norm – a constitutional standard – sustains the legal existence of a transcendental-logical norm. This state of affairs introduces into the content the scope of the *Grundnorm* rooted in Hans Kelsen's legal positivism. The argument that the objective construction is an assumed norm would not hold because it is difficult to look at the *Grundnorm* in the category of philosophical fiction or an illusion of reality. It is convincing that the *Grundnorm* has strong ontological determinants. It exists not only in the Hans Kelsen's abstract mind but also in philosophical sciences and the theory of law. It is a doubtful assumption that an empty norm can provide so many theoretical grounds for the constitution of the legal system. It is reasonable to assume that the fundamental norm can have a valid axiological value and show an axionormative meaning. At the foundations of this claim there is a fact that a transcendental-logical norm is a good ground for the legal system as a fundament for establishing the normative structure for the positive law. In other words, the existence of the *Grundnorm* guarantees establishing a specific legal order. Its value comes from the unification of the complexity of norms into a legal system.

What is more, it cannot be denied that the *Grundnorm* can have a specific axionormative content. This view on the problem allows us to isolate the axiological character of the *Grundnorm*, for example by looking at how the *Grundnorm* is ordering reality (state of facts). It would be a good idea to introduce to the legal science notions like normative axiology and normative metaphysics and to continue a scientific research in that direction. On the grounds of normative axiology we find philosophical and legal issues directed at demonstrating the values that are derived from the *Grundnorm* and presumably inside of a legal norm. The legal act can become an important structure for studying the axionormative values that derive from ontic legal regulations. Also the existence of a specific legal norm that has a legislatively established content helps to extract the normative axiology in the context of establishing the law. A similar hypothesis can be formulated in the context of normative metaphysics. Hens Kelsen's legal normativism enables us to look for the roots of this discipline of science. The transcendental character of the *Grundnorm* determines scientific research in the direction of proving the existence of Kant's metaphysics in the content of legal norms defined in the context of the analyzed philosophical field. Following this train of thought we must notice that n view of the above distinction we can also extract the teleological nature of the *Grundnorm* and an intentional mechanism of norms based on coercive means in legal normativism. Apart from that, the aim of distilled norms plays a huge role in the field of constitutional standards.

By analyzing Hans Kelsen's legal normativism we can say that the positive law is not in any relation to metaphysics, history, axiology, ethics or other social sciences, including political sciences, sociology or psychology. However, there might be a number of objections against that claim. One of them is that Hans Kelsen often referred to biblical theological sources to give examples that support a specific state of affairs. In this way he enters the field of the literary school of law. This shows that the previous approach to his legal normativism was incorrect in terms of methodological assumptions and conclusions that were based on in terms of.

We can also see an incorrect approach to the *Grundnorm* because there are premises that show the connection between moral and legal norms in Kelsen's concept. Legal norms are often in accordance with moral norms. Morality of law means here the behaviour that is mandated or banned by legal

norms. In most normative systems murder is penalized. The ban of taking somebody's life is derived from morality. It seems that every legal system has arisen on the ground of the culture of a specific country or area. A culture that emerged from a repetition of human behaviour through many centuries has established its moral norms (patterns of behaviour that are approved or disapproved by the society) which could not be ignored in the process of establishing the positive law. It leads to a conclusion that complete separation of law and morality is possible only on the validation ground, but not in the reflection on legal norms. It is not about affirmation of the theoretical and legal concept of legal naturalism, but about demonstrating the impossibility of sustaining a pure concept of the theory of law in context of one of its fundamental assumptions about the existence of the *Grundnorm* which is completely independent from other extrajudical norms. These relations that can be found in Hans Kelsen's theory of law are a part of the philosophy of law. This state of affairs might be found encouraging so as to draw conclusions about the presence of different from the Kantian philosophical trend in the legal normativism of Hans Kelsen. For this reason there seems to arise a need to consider the necessity of introducing the term of normative morality present in the law. The introduced concept is mandatory due to a more detailed description of the relationship between the basic norm and the normative and actual existence of positive law. However, the main objective of the newly developed research in the field of legal normativism will be to initiate efforts to determine the legal content existing in the area of the basic norm. The reason for such a necessity is the substantial extent of constitutional norms in relation to the area of the basic standard. It is doubtful that a basic norm should close in the area of transcendental metaphysics. The scope of the content of the constitution is definitely too wide to recognize only the transcendental nature of the basic norm. The content of the participatory constitution in the basic norm makes it necessary to state that nothingness and emptiness cannot constitute the basic normative content. Therefore it is difficult to speak only about its metaphysical meaning without pointing to the content. An important role for clarifying the scope of the basic norm speaks for political and system solutions shaping this legal norm. The important role in explaining the scope of the basic norm supports political and systemic solutions shaping this legal norm. These assumptions provide the basis for deriving a num-

ber of ontological assumptions to the transcendental norm. Wider scientific considerations will allow for conducting a research analysis into axioontological, meta-axiological and axio-metaphysical meaning of the basic norm.

In this article it is underline a view important sentences. Creating social relations only with the positive law can lead to evil. In other words, the concept of pure theory of law by Hans Kelsen focused solely on human obligations and his subordination to positive law became the cause of totalitarianism. The law must exist for man, not the man exist for the law. His views were the basis of fascism and Nazism. The law was enforced by violence. The citizen did not have any rights but only duties. Many scientists speak in this context.

M.A. Krapiec noted that: "Natural law is connected with positive law – established in a necessary way, but only negatively. This means that we cannot make a deduction of positive law from a fundamental judgement-natural law, but at the same time it means that every law negating the content of natural law: do good. Human society confirmed this in the fact of the Nuremberg Tribunal, in which leaders of the III-rd Reich were convicted as criminals. These men, in obeying the positive German law of the III-rd Reich, thereby did not recognize objective good and broke the natural law exprfessed in the judgement: do good"[13].

IV. Summary

As a result of this distinction, it should be emphasized that the law based on the legal normalization of Hans Kelsen has extra-legal features. The legal order is based on certain rules of governance that are valuable to the state It is based on a specific axiology, which is fundamental to law. It is not possible to agree with the argument in the science of law that Hans Kelsen's theory separates itself from the philosophy of law. His concept of the *Grundnorm* has a strong philosophical basis. Modern scientific research should aim at showing the connection between his concept and the metaphysics of law.

J.Ch. Merle underlined that: "Cohen and Kelsen consider law a science, a conception that consists of two elements. Firstly, like Kant, they believe that law is the object of systematic knowledge under a single principle. Whereas

[13] M.A. Krapiec, *Man and natural law,* Lublin 1993, p. 245.

Kant locates this systematic unity in a metaphysical concept of right, Cohen sees it in the ethical idea of the unity of the human being and Kelsen in the hierarchy of norms ordered underneath a single, basic norm. Secondly, according to their transcendental method, imputation is the fundamental category of law. A tension exists between both elements, of which each is dispensable for the other and vice versa. Considering law as a system is not compatible with Kelsen's commitment to positivism, because it makes it impossible to reconstruct the following three legal phenomena: a country obtaining independence, the validating purport, here, the recognition of legal acts taken by a foreign state, as well as the double source of the validity of law – that is, legitimate authority and consistency of substantial law. On the one hand, one cannot combine, without some contradiction, legal positivism with Kelsen's idea of a system. On the other hand, it is however possible to combine Cohen's idealism with the neo-Kantian idea of a system"[14].

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