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## NOTES • DISCUSSION • BOOK REVIEWS

### Hans Kelsen on Norm and Language\*

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#### 1. Introduction

An ambiguity colours Hans Kelsen's theory of a norm. On the one hand, Kelsen claims to adhere to what he considers the is/ought dichotomy. His essays and books frequently begin with a restatement of the is/ought dichotomy without further explanation (Kelsen 1970, 5–6, 193; 1945). Kelsen claims that he is describing law as it really is (Kelsen 1961, 45). The consequence is that commentators have been mystified with Kelsen's 'is.' H.L.A. Hart described Kelsen's is/ought dichotomy as "puzzling," "a surprise," "difficult," "restrictive," and "very alarming" (Hart 1983). Joseph Raz attributes a "semantic anti-reductivism" to Kelsen's review (Raz 1986). Are recent re-readings of Kelsen's is/ought dichotomy on the right track (Paulson 2001, 59–61; Bindreiter 2001, 166–68)? Or is it possible that Kelsen understood the is/ought distinction in a very different manner than that by which his contemporaries or, indeed, today's readers understand the distinction?

The key to Kelsen's claim that his legal theory is "practical" and "realistic" is that the legal "is" is constituted from norms. Anglo-American jurists have faced uncertainty as to the signification of the term, "norm."<sup>1</sup> Norms "exist"

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<sup>1</sup> One translator of one of Kelsen's important essays states that "all other equivalents—'rule,' 'maxim,' 'obligation,' 'injunction'—have associations which disturb the sense. The reader must simply accustom himself to a new, or at least unfamiliar use of the word, carefully dispelling from his mind any such other meaning as 'average,' 'general level,' 'normal standard.' The translation of 'is' and 'ought' presented him with the greatest difficulty" (Wilson, 1934, 476).

but this is a very different sense of existence than an existence constituted from social behaviour, or concepts, or meaning, or even speech acts. Instead, I shall argue that a norm, for Kelsen in his classical period,<sup>2</sup> is a signifying relation between a sign and a cognitive or conceptual object. The germ of this idea lies in a recent essay to the effect that Kelsen's legal theory is about speech acts (Roermund 2002, 209). I wish to privilege Kelsen's theory of language although in a very different sense than that of speech acts. Once one appreciates the signifiatory character of legal existence, one needs to ask "how is a binding signification distinguished from a non-binding one?" This question begs that we inquire as to what is excluded from legal language. Our attention needs to re-focus upon Kelsen's "oughts," as much as his sense of the "is." I shall argue, indeed, that Kelsen offers a full theory of language which excludes important phenomena in order to retain its purity. This theory of language is important in gaining an appreciation of the richness and depth of Kelsen's theory of law.

## 2. The Act of Signification

The best starting point for Kelsen's theory of language is his reaction to what was later known as the sources thesis. Kelsen's distinguished a concept from an act of will. A concept (or what is sometimes translated as a "thought") does not really exist except in our thinking about pure ideas or what Hegel called empty concepts. A concept, unlike a will, does not represent an object. A concept dwells in a "pretend" world where "one can think or imagine anything possible which is not existent in the real. I can think to myself a norm which has not been actually posited by any authority and is not the meaning of any real act of will occurring in the world" (Kelsen 1973c, 220). Thus, a concept contrasts with a will: There can be no thinking "immanent in willing." If I will an object (for example, that one ought to stop at a red light), I first contemplate about the object as a concept before I will it. If the concepts were uncontaminated by inclinations, human agents would not have duties as all "oughts" would be implemented. Kelsen says that, in contrast, the will refers to a "something" (Kelsen 1973d, 242; 1970, 6). Logic can only relate one concept to another concept. With an act of will, however, logic is an inappropriate tool of analysis.

Arbitrariness, not logic, characterises an act of will. One person wills that a second person ought to behave in a certain manner in certain circum-

<sup>2</sup> I shall generally focus upon the mature enunciation of his project often associated with the period 1922–60 and with his stay at Berkeley (Paulson 1990, 1998, 1996). Paulson describes the periods as the constructivist or concept formation phase (until 1911) best reflected in his *Habilitationsschrift* (1911) and *Main Problems in the Theory of Public Law* (1911); the classical phase (1922–60) best reflected in the first edition of the *Pure Theory of Law (Introduction to the Problems of Legal Theory, 1934)*, the *General Theory of Law and State* (1945), and the second edition of the *Pure Theory of Law* (1960); and the sceptical phase (after 1962) represented by the posthumously published *General Theory of Norms* (1991). For a contrary view, see Eugenio Bulygin (1995).

stances (Kelsen 1970, 49; 1961, 27; 1991, 361). The legal statement is addressed towards another person (Kelsen 1991, 59). In order to avoid the arbitrariness in an act of will, the will must be constrained by a legal act (Kelsen 1970, 5–10; 1973f, 156; 1973c, 217–8; 1973g, 114–6; 1998a; 1991, 26–7). The "legal act" is the signification *about* an act of will (Kelsen 1984). The signification need not be written in a code. It may be gestural (as is the wave of a traffic police person), symbolic (as is the red light at an intersection), voiced (as with the voice of a police person's command), customary, or legislated (as in a statute; Kelsen 1970, 7; 1973f, 156). As with Thomas Hobbes, John Austin, H.L.A. Hart, and Joseph Raz, though, Kelsen forgets the role of unwritten assumptions and expectations which enter into experiential meaning which I shall distinguish in a minute from signification.

### i) Signification

What does Kelsen intend by the signifiatory character of a norm? Kelsen calls a sign, a "statement." The judge wills an object as the judge reads a statute just as a legislature wills social action or empowers an official (Kelsen 1990). Kelsen's claim is that a norm concerns signification. Signification displaces concepts and socially contingent facts in favour of an "ought" or ascription. The mediating role of a sign privileges the interpretative act. Since language constitutes social reality, Kelsen considers the signifying relation "practical." Practicality encompasses opaque rather than transparent signs. Further, signification possesses a retrospective character.

The act of signification does not amount to a search for truth, according to Kelsen. Truth, for Kelsen, involves the correspondence of the proposition with an external fact. Kelsen advises that it is really the proposition in the statement, not the statement *per se*, that is true or false. A legal official does not seek such truth: "There is no analogy between the truth of a statement and the validity of a norm" (Kelsen 1991, 388–9). The sole interest of the legal official, in contrast to truth, is to ensure that any behaviour or statement is *authoritative* or *valid*. An act of signification addresses validity. Truth relates to a *mere concept* and the logic *between concepts*. A statement, however, represents or signifies such a concept.

But the statement about the concept does not complete the legal act. For a statement receives its own signification (that is, its relation with an object) from other statements about the same or other willed objects. When a legal official interprets a norm, the official configures the norm into a "chain" of norms. The chain forms a system of norms, independent of the substantive "ought" content of the concept to which the signification refers (Kelsen 1973e, 86, 92). This would be so even if there were an Absolute or intrinsically valued good. Morality, for Kelsen, is limited to the chains of *ought-statements* or norms in that the norms direct that one ought to act in a certain manner: "For the concept of 'goodness' can only be defined as that which

'ought to be,' as that which accords with a norm; and if law is defined as a norm, this implies that what is lawful is good" (Kelsen 1973e, 90; 1970, 66).

Accordingly, the legal act objectifies what commences as an institutional author's "enactment of a subjective value through a will." For the signification of the will abstracts the will from its social circumstances. One norm is distinguished from another in an interrelated chain of norms. A statement, if recognised as a unit in the signification chain, is analysable. The analysandum, that is, is a signification about an act of will; it is not a pure concept itself. Precisely because the unit is not a concept, *veritas* is immaterial. The legal official does not support or reject the original substantive content of a legislated object: "The function of legal science is still in no sense a valuing or evaluating, but rather a value-free description of its subject-matter. The scientific jurist identifies himself with no legal value, not even with that which he describes" (Kelsen 1973e, 91; 1970, 68). This explains why Kelsen writes that we speak figuratively when we say that an institution's act of will "creates" a norm: "The act of will, whose meaning is the norm, is the act of which we say figuratively that the norm is 'created' by it" (Kelsen 1973c, 217). In *Causality and Accounting* he writes that "When we say that by such an act or acts a norm is 'created' or 'posited,' this is merely a figurative expression for the fact that the meaning of the act or acts is a norm" (Kelsen 1973f, 156).

The legal signification is a second-level representation about the concept expressed in a first-level act of will. The signification itself does not prescribe: It *describes* an institution's statement about the concept (Kelsen 1970, 80; 1961, 45). In the *General Theory of Law and State* Kelsen makes the same point by distinguishing between the will of a human agent or "real being," on the one hand, and the will of a juristic person, on the other (Kelsen 1961, 107–9). The collective will is really "a figurative expression" or "fiction" (Kelsen 1961, 273–4). The willed referent is fictional because it is represented as a statement. If the "real being" is a fact, then the willed concept is a fiction.

No one normative relation stands isolated. The *relation* with other signifying relations constitutes legal language. Kelsen describes a norm as nested in a "chain" or "complex." Each relation between sign and conceptual referent depends upon other relations between signs and concepts for their signification. Kelsen emphasises this inter-relation in the first edition of the *Pure Theory*: "Given the dynamic character of law, a norm is valid [authoritative] because and in so far as it was created in a certain way, that is, in the way determined by another norm; and this latter norm, then, represents the basis of the validity of the former norm" (Kelsen 1992, 63–4, 29–30). In the second edition, Kelsen describes signifying relations as "dependent legal norms," "tied to each other": "The first norm is not an independent norm, but fundamentally tied to the second." (Kelsen 1970, 55). And he describes the signifying chain in the *General Theory of Law and State* in this manner: "The quest for the reason of validity of a norm leads back, not to reality, but to another norm from which the first norm is derivable" (Kelsen 1961, 111). Any one

norm is, he writes in the *Pure Theory*, "a link in an infinite chain" (Kelsen 1970, 93). A signification produces signifying differences and thereby revises willed concepts. The legal act is thereby an interpretative act. A signification is constructed where each signifying relation is a unit in the whole. What is not recognisable as a signifying unit is non-law.

Accordingly, Kelsen continually describes his pure theory as a structural theory where "the law is a *system*, and [ . . . ] all legal problems are problems of system" (Kelsen 1934, 498). Such a structure is hidden because only language is effectively "real," according to Kelsen. The hidden structure would be static if it focussed only upon the actual willed objects of particular legislatures or courts. The structure would be dynamic if it focussed upon *the act* of signification. The norms regulate their own construction of a boundary which marks off legality from the non-legal. Indeed, the relations amongst norms determine not only the act of construction but also, to a greater or lesser extent, the substantive content of the concept that the relation signifies (Kelsen 1971a, 279; 1970, 209).

### ii) What Is an Act of Will?

If Kelsen granted so much weight to the signification about an act of will as opposed to the act itself, what precisely is an act of will? An institutional author, such as a legislature, wills that an addressee's behaviour comply with the willed object. The legislature does not describe how an individual may behave from day to day. Such would address the "is" realm of brute social facts. Rather, the legislature wills how one ought to behave in certain circumstances.

Now, one might become confused as to what importance Kelsen grants to an institutional act of will. At an initial reading, one might take Kelsen, as some commentators have, as describing a norm as synonymous with an act of will. This seems to be Kelsen's own view in his later essay, *The Foundation of the Theory of Natural Law*: "A norm is not a statement [ . . . ]. The statement is the import of an act of thought. The norm aims at determining the will of another, the statement at determining the thinking or knowing of another; it is intended to let the other know something. To put it figuratively, the norm proceeds from the willing of one to the willing of another, the statement from the thinking or knowing of one to the thinking or knowing of another" (Kelsen 1973g, 115). A statement may be true or false. A norm, however, may be only valid or invalid. Kelsen is conscious that this association of a norm with an act of will contradicts his earlier view that a norm signifies an act of will. "I stress this [that a norm is an act of will] in conscious opposition to a view that is generally accepted, and was long also upheld by myself" he continues in *The Foundation of the Theory of Natural Law* (1973g, 115).

According to his long standing view (especially in the first and second editions—1934 and 1970—of the *Pure Theory* and in *The General Theory of Law*

and State of 1945), however, Kelsen describes a norm as a *statement about* an act of will. The statement *represents* the author's will as to how one *ought* to behave (Kelsen 1970, 10). The norm is not the original concept intended by the institutional author which willed the concept. Rather, the norm is language-dependent: A norm *represents* or signifies the institution's willed concept. And the only legal goods are those that the language recognises (Kelsen 1973e, 89).

Thus, the act of will is expressed *through a language*. One can access the legislature's or judge's willed concept only through that language. William Ebenstein, in his close reading of Kelsen's *Pure Theory of Law*, distinguishes in like vein between the "norm as act" and the "norm as meaning." A "norm as act" is something that is a *contradicto in adjecto*: If a norm creates, imagines, or wills some other referent, the will functions in an actual causal process of "facts." As such, a "norm as act" is logically distinct from a norm that is understood as a "norm as meaning" (Ebenstein 1969, 47–8). One may measure a "norm as act" according to a quantifiable time and territorial space dimension. A "norm as meaning" transcends such a dimension for it is experiential.

So the intent of the legislature cannot constitute the legal act (Kelsen 1971a, 272). The norm *represents* the will. Because the legal act is a relation of a sign to a cognitive object (or concept), there remains an historical contingency about legality. But instead of the contingency drawing from the legislature's act of will, the contingency surrounds the official's statement *about* the will. The latter re-presentation signifies the willed concept. But because the later statement associates a willed concept with a pre-existing "chain" of statements, the official's statement is a signification about significations. Yet, each signification has the effect of expressing an act of will, one might say, at the very moment that the interpreter reads the text that represents the initial act of will of an institution.

The language signifies acts of will (Kelsen 1961, 26–7). A sentence imputes a concept. A concept results from imputation: "Imputation has an end point whereas causality has not" (Kelsen 1970, 91). The end point of imputation is the referent of a concept. Using Husserl's metaphor, the imputation encloses the socially historically contingent actions like a garment. Kelsen calls the referent "a something" (Kelsen 1970, 6). Such a "something," being absent from the sign, is radically different from brute natural or social events. Though the institutional author initially wills that addressees act in a certain manner ("thou shalt not steal"), the directive becomes an item of legality when the author's intent is represented as a sign or norm in a system of norms. It is the statement "thou shalt not steal," not the concept of stealing, which renders the concept a practicality. Even the concept itself cannot be a concept without a private language to "think" about the stealing and what "thou" ought to do. The signification occurs in relation to another signification. The prescription is embodied as a sentence. So legality arises from a system or structure of signs that represent concepts.

Any prescriptive statement, which cannot be recognised vis-à-vis other prescriptive statements, is extra-legal. Such a statement is moral (that is, an "ought") that exceeds the boundary of the system of signs. It is an unintelligible fragment—unintelligible, that is, in that it is not recognisable as an analytical unit in the system of *ought-statements*.

### iii) *The Two-Stage Act of Signification*

The official signifies an act of will in a two-staged act of signification.

First, an official reads the signs as an "ought" statement. In this "ought" statement, the judge intends a conceptual object that can fit inside the chain of "ought" statements. So, the signification of the object arrives *after* the concrete social/cultural event took place. That is, a law crystallises in the moment of signification—not with the statute or judgement. The act of signification is the legal *event*. The signification act encloses what the legislature or court said. The interpreting judge's actual intent, like the legislature's, is excluded from the signification project (Kelsen 1991, 423). So too, the original intent of a particular legislature, as expressed in a particular text, is effectively excluded from the legal event. The act of signification retrospectively superimposes a revised referent upon the text of the earlier legislature's or court's act of will (Kelsen 1961, 135, 149). The statement *about* a legislated norm "will always add something new" (Kelsen 1961, 146). The interpreter *intends* a new object. The consequence for the legal analysis of the above signification event is that the interpreter's intentionality reifies the act of will of an institutional author (Kelsen 1970, 8).

In the second moment of the legal act, the judge retraces or looks back to the linkages of "ought" statements that other judges have shared. In the process, the objective "ought" statements displace the subjective world of feelings, natural and social facts. The court does not formulate existing law, nor does it seek and find the law, nor does it pronounce the existing law as a doctrine. Although a court may believe it is doing so, the court *constitutes* the signification of the legislated norm by situating the legislated norm amongst other already recognised statements. A chain of norms itself, like an "invisible hand," confers a signification to the legislated norm. Signification involves *action*, the act of constituting an object from a statement.

There is another point that provides insight into the act of signification that Kelsen privileges. The act of signification by a human agent, according to Kelsen, is creative. Natural law theory claims, in contrast, that humanly posited laws must replicate pre-existing, universal natural laws which transcend posited human laws (Kelsen 1971b, 297). Such a passive human law, in natural law theory, contrasts with the active constitution of a signified object by interpreters.

In addition, although the framers of a statute or judgement may intend one essential criterion, the legal act is connotative (Kelsen 1971b, 298). A

legal act is a second-order representation about a first-order desire (or will) which itself is represented in a statement. The legal act, that is, supplements a statement about the primary legislated will. The legal act is a "reconstructed act" (Kelsen 1998a). But because the representation becomes primary in the act of signification, the supplement (a sign that signifies a concept) supplements (is secondary to) the supplement (that signifies the signification of the concept). The primary legislative enactment is displaced in the signification act. The function of the legal act, as for sociology, is "to designate its own particular object [by putting the object in a sentence] and lift it [the object] out of the whole of social events" (Kelsen 1971a, 270). That is, a norm, as Kelsen understands it, is not a semantic assertion or what Ronald Dworkin has called the "semantic sting." Instead, because a sentence represents or approximates the act of will of an institutional author at a second level, the sentence possesses connotative significations. Any one official will have the opportunity to give a different second-order signification to any sentence. There is always room for indeterminacy in the fulfilment of a signification by a later addressee.

#### iv) Signification and Meaning

We need to appreciate at this point the distinction between signification and meaning (Conklin 1998a, 1998b).

Kelsen insists that the signification of social experience does not succumb to metaphysics as did natural law theory. For the act of signification is a human construct. And such a construct refers to a humanly willed object, not to some ready-made fact, as the Renaissance scientists had assumed. But this is not entirely so. For one thing, the legislature's act of will, about which the signification may initially claim to refer, is not its members' experienced desire but a rational will that is purged of all such inclinations. Further, Kelsen emphasises that the legislature's act of will itself refers to a concept that is prescribed. Finally, the judge's signification of the legislature's "ought" statement produces another signified concept that is willed. As a consequence of these three factors, the socially contingent legislative experience is lost in the legal act of the official. The relation of the statement to a willed concept is what Kelsen considers "a judgement" (Kelsen 1970, 79). Precisely because the many desires of *Realt* officials (whether of a legislature or of a court) are thereby displaced, the norms become objectified from the social and historical contingencies of such institutional authors. This helps to explain why Kelsen describes the judge's creative act of interpretation on more than one occasion as "value-free."

In this respect Kelsen elaborates a theory of language that possesses a taint of the influence of Edmund Husserl's early work in the *Logical Investigations* (Husserl 1970). Kelsen later acknowledges Husserl's influence in his *General Theory of Norms* (Kelsen 1991, 276–8, 172; 1973c, 223–34, n. 8). Kelsen acknowl-

edges that he takes this sense of a representation from Husserl's sense of *Ideell* in *Experience and Judgment*. In particular, Husserl described how one *constitutes or confers meaning into* a sign. The embodiment of meaning draws from the interpreter's past experiences and her/his expectations of the future. The interpreter confers meaning as s/he reads a book or as s/he perceives a natural referent, such as a blackbird on a tree. Similarly, Kelsen appreciates how a later official re-reads a sign as s/he confers meaning *into* the sign. Like Husserl, Kelsen claims that an official *acts* as the official interprets a statement. Further, the act of signification, for Kelsen, is forward-looking in the direction of an absent concept just as it was for Husserl.

However, unlike Husserl, Kelsen excludes the experiential moments through which an interpreter embodies the referent of a statement with meaning. As a consequence, the relation of a statement to a willed concept, for Kelsen, becomes objective at the cost of being purged of the official's embodiment of meaning. Husserl describes how each moment of interpretative experience draws from one's past experiences and future expectations as one reads signs. Hans-Georg Gadamer, the student of Husserl's student (i.e., Heidegger), called these experiential meanings, *praejudiciae* or pre-judgements (Gadamer 1975). One brings horizons of *praejudiciae* into a text as one reads it. An interpreter *embodies* (brings his or her *bodily* experiences *into*) a sign with the pre-judgements of a *meant* rather than a signified object, according to Husserl (Conklin 1998a, 103–7, 136–40, 182–9).

Although Kelsen believes that his understanding of a legal act is synonymous with human experience (Kelsen 1998a, 171), he excludes the constitution of embodied meanings from language. Embodied meaning is external to the sign-concept relation and, therefore, non-analysable. Even the act of will is considered a rational "intent" abstracted from experienced meaning. Although a "wish" or "interest" has an emotive or empirical character to it, a will, according to Kelsen, has an "ought" character. As a consequence of the rationality of the will, Kelsen even disembodies the meaning-constituting act of a legislature. In the *Foreword* to the second printing (1923) of the first edition of the *Pure Theory*, for example, Kelsen explains that the legal will does not represent a real psychological material fact but simply a *juridico-normative* cognition or concept. Because the legal will only expresses or prescribes an "ought"—or, more accurately, the unity of the prescriptive "ought"—its sharp separation from the psychological concept of desire secures the purity of legal theory against the inroads of psychology and sociology (Kelsen 1998b, 8).

Kelsen rejects the view as naive that signs are transparent. And yet, metaphysics also characterises Kelsen's theory of language because he considers the embodied *meaning*, as opposed to signification (or the relation or the sign to its object), as exterior to legality; that is, as non-analysable. The interpreter implants a revised concept into legal signs. The relation of signs to cognitive objects, excluding such inclinations, claims a reality that supersedes

Absolutist philosophy: "For between the general norm and the real circumstance there is interposed the individual concrete norm created in the act of concretion, which [...] creates in a constitutive way the precondition for the realising of a concrete consequence. This so-called subordination of the social circumstance under the general norm is thus an act of creating law, an essential constituent of the process in which the law is posited" (Kelsen 1973b, 42).

v) *The Is/Ought of the Legal Language*

We are now prepared to return to Kelsen's sense of the is/ought dichotomy. Not surprisingly, Kelsen writes that there are two types of sentences. First, there are sentences about "what is" or *Sein*. Second, there are sentences about "what ought to be" or *Sollen*. A *Sein*-statement refers to uncontrollable and uncontrolled natural objects or to social facts as objects of a behavioural investigation. An "ought-statement" creates a product. The "ought-statement" is generated by human action. Since Kelsen takes for granted a radical gap between the "is" and the "ought," the "ought-statements" does not describe the causal relations of nature nor the behavioural events of social relations. Rather, the "ought-statements" express the duties that an addressee ought to fulfil in certain social circumstances. The "ought-statements" are directed towards an ascriptive "ought" world.

Kelsen takes his cue from Kant's distinction between the *noumenal* and *phenomenal* realms (Kant 1981). According to Kelsen, Kant asked "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" Kelsen continues in the *Pure Theory of Law* in the same way: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?" (Kelsen 1970, 202; 1998b, 4). So a legal statement possesses a prescriptive, rather than just a descriptive, quality to the statement. The statement about a duty prescribes how one ought to behave even if one cannot in fact behave accordingly (Kelsen 1970, 4; 1991, 154, 163, 338–9; Vernengo 1986, 101–3). The "ought" character of an act of will possesses the "may" of a permission as well as the "can" of an authorisation. Whereas the signifying norm is an "ought," the act of will, according to Kelsen, is an "is." But this "is" is drawn from a *noumenal* realm, not from the phenomenal realm as would be the case with a mere emotive wish. And the "ought" of a norm involves an action: One ought to act a certain way in the empirical realm once one returns from the *noumenal* to the phenomenal world. Kelsen says that a "statement" designates "not only the meaning of an act of concept, but also the act of thinking and speaking itself" (Kelsen 1973d, 242). Accordingly, an act of concept lacks the "practical" character of a norm (Kelsen 1991, 58).

Why is a norm an "ought" rather than an "is"? Because a personal arbitrary desire, which emanates from an "is," contrasts with a will that posits a concept in a forward direction. This forward-looking conceptual referent does not precede the official; rather it is retrospectively posited onto the "is" by the official. The referent is conferred as the official signifies. Being the referent of a will, the referent is absent from the will and, therefore, it cannot possibly be an "is." The referent is even absent from an official who represents the referent as a statement. We are left, then, with an "ought" or duty. A legal statement represents that "ought" duty. Until a statement signifies the duty in historically contingent circumstances where human frailty and inclinations prevail, the duty does not crystallise. The duty is merely a pure concept (if such were possible without a sign) where logic may connect one concept to another and then to the factual world. Thus, Kelsen's theory of language necessitates duties that are directed towards conceptual referents.

Kelsen explains this point in yet a different manner. In *On the Basic Norm* Kelsen distinguishes between a legislative act and an act of signification. A legislative enactment is a natural or sociological fact that can be described. But the legislated act of will itself is not a norm. Rather, a norm is an "is statement" about the legislative act. That is, a norm is the re-presentation of the legislative act. Kelsen called it the "meaning of a fact." The "existence" of the legislative event differs from the "existence" of the event of signification. The one is an empirical fact and the other is a signification. The one is an empirical fact and the other is a signification. Legal validity goes to the latter signification sense of existence: The substantive content of a concept is the *representation* of the content by a sign, not the particular substantive content that the institutional author—whether a legislature or an official who analyses—intended as the concept. An authoritative "is statement" can only refer to another authoritative "is statement" in order to maintain the is/ought distinction. As a consequence, the existence of a norm, as an act of representation of a concept, may well occur even though the behaviour prescribed, permitted, or authorised has not actually taken place. Though the norm is an "is statement," the norm does not describe a social event as if it were empirically perceivable. Legal analysis, rather, is a signification event. Thus, the signification, though an "is," prescribes an action in its substantive content. As Kelsen put it, legal authority is prescriptive rather than descriptive: The jurist's role is to *de-scribe*, not to evaluate or *prescribe* (Kelsen 1970, 2, 73, 79). Rules of law are "ought" statements describing norms that prescribe conduct that an addressee ought to do.

Accordingly, the "ought" of a rule of law possesses a descriptive character at the same moment that it ascribes that the addressee act in a certain manner. A statement about a rule describes a norm rather than a phenomenal fact. The statement describes an ascription. A normative structure, Kelsen admits, is a different structure from one that a social scientist constructs from material social facts (Kelsen 1970, 76).

Kelsen takes us one step further. The act of will, such as a legislature's will, is generally considered the "is." But Kelsen argues that an "ought" statement actually constitutes the legal "is." Thus, there remain "oughts" that "ought" statements exclude. How so? Because the "ought" statement is an act of signification: It ascribes, regulates, and authorises a cognitive object. The object directs how addressees ought to behave. Thus, Kelsen maintains a strict adherence to the is/ought dichotomy even when he fleshes out his theory of legal language. When the will is applied to a person in social circumstances, for example, the will takes on an "ought" character. The legislature describes that one ought to behave in a certain manner. One cannot compare the "substrate" of the "is" with the "substrate" of the "ought": "The Ought remains a pure a priori category for the comprehension of the empirical legal material" (Kelsen 1934, 485). That is, one can only say that a particular behaviour agrees with a norm that decreed that certain behaviour should be obligatory. The key to Kelsen's sense of is/ought is that the "ought" of the "ought" statement is immersed in a language and that language constitutes the legal "is." One "ought" statement is differentiated from another in an autonomous language: The relation of the statement to a willed concept "receives its legal character from yet another norm" (Kelsen 1970, 4). The "ought-statement" cannot pass as a fact of nature nor as a social fact (Kelsen 1991, 61). The "ought" statement is nested in a language. Kelsen contrasts language with the causality of empirical natural facts. Language incorporates a "value-indifferent substrate" (Kelsen 1991, 62).

### 3. The Exclusionary Character of the Language of Norms

#### i) The Exclusion of "Morals"

Kelsen's theory of language is pure because "it seeks to preclude from the cognition of positive law all elements foreign thereto" (Kelsen 1970, 68). In the *Pure Theory*, Kelsen calls the foreign elements "alien elements" (Kelsen 1970, 1). What is alien or foreign is cognated. The structure of norms (signifying relations) must remain separate from politics and morals. "The postulate of complete separation of jurisprudence from politics cannot sincerely be questioned if there is anything like a science of law" (Kelsen 1961, xvii). "[T]he task of the science of law is not to approve or disapprove its subject, but to know and describe it" (Kelsen 1970, 68). Kelsen's lawyer must act like Hume's "impartial spectator."

But what is the impurity that is excluded from the legal language? Any appeal to psychology, sociology, political theory, or religion—any such appeal—incorporates the non-analysable exteriority into legal existence and thereby contradicts the is/ought separation. Since legal existence, for Kelsen, is constituted from a chain of "ought" statements, the official and the jurist must not evaluate such statements with reference to some discrete, bounded, self-referring pure concept that transcends the language. "A

system of norms can only be valid if the validity of all other systems or norms with the same sphere of validity has been excluded. The unity of a system of norms signifies its uniqueness" (Kelsen 1961, 410–1). Kelsen continues to reason that one cannot have two simultaneously valid normative systems in that "a consistent positivism [. . .] regards the positive legal order as supreme, non-derivative, and therefore non-justifiable by reference to a superior system of norms." Any unrecognisable "ought" statement does not "exist" legally speaking. The analysable units of the language are politically, ethically, and religiously neutral.

Two consequences flow from the exclusionary character of legal language. First, the language possesses coerciveness; no such coercion characterises the moral claims excluded from the language. Second, morality, for Kelsen, is not a special Kantian sense of morality, of duty, and will. If that were so, all legal norms would be moral since norms are duties directing addressees how they ought to conduct themselves. Nor is morality an inquiry into the good life such as one finds with Plato and Aristotle. Legal norms are content-independent. Only if a concept is an object of a recognisable "ought" statement, is the concept an element of a legal norm (Kelsen 1973e, 86). A norm (or *statement about* an act of will) is differentiated from another norm in a system of norms. The system of norms, as a consequence, creates and regulates its own existence. The system of the signifying relations even determines what is impure. The "morality" of Kant and Aristotle, in contrast, depends upon some transcendent duty or good for approval (though, of course, such a duty or good is not enough for either Kant or Aristotle).

#### ii) The Subordination of the Will of Institutional Sources

If language involves "ought" statements that exclude impurities such as experiential meaning, can one speak of the existence of law? Kelsen insists that the legal "is" differs from both social behaviour and from natural facts. And yet, legal statements are said to constitute legal existence. As a result, the legal act takes on "an *ideell* existence (as opposed to a *realit* existence" (Kelsen 1991, 278). Kelsen also insists that legal existence is not drawn from concepts. Metaphysics is the preserve of natural law theory for the latter postulates an Absolute that is a *Ding an sich*. How, then, can Kelsen describe the legal act as an "is" if it addresses neither experiential meaning nor brute natural facts nor social behaviour nor speculation about the Good?

As mentioned above, Kelsen projects the is/ought, fact/value distinction into his theory of the relation of statements to a cognitive object: What is unrecognised in the language is impure or subjective. Since legal signification is an "external fact," an official's signification of such an institutional source's will is "not perceptible by the senses such as, for instance, that colour, hardness, weight, or other physical properties of an object can be perceived" (Kelsen 1970, 2–3). And yet, it is an external fact. A norm (that is, a



statement about an act of will) transforms a socially contingent event (such as a legislature's act of will), identifiable in a quantifiable time (a date on the calendar) and space (a legislative building), into a representation of such an event. One norm also transforms a prior norm: "Under the pretext that the original norm is being supplemented to make up for its deficiencies, it is overturned in the course of being applied and is replaced by a new norm" (Kelsen 1990, 133). Social conduct either corresponds with the signification (and is thereby "legal") or it does not do so and is thereby "illegal." What the members of a legislature subjectively intend may not necessarily coincide with the legal or objective signification of the legislature's statements.

As a consequence, the act of representation subordinates the legislature or court, which wills a concept, to the *ex post facto* statement that re-presents or signifies that willed concept. Legal existence (or legality) addresses the *ex post facto* signification, not the initial legislative act. Indeed, as mentioned in 1941, a legal obligation continues after a particular legislature dissolves (Kelsen 1971a, 272). A signifying event, initiated by an author's will, transcends the institutional authors. The signification objectifies the social event of a legislative act. Such an objectifying signification encloses all socially contingent behaviour. Consequently, like John Austin's view of the "habits of the People" (Conklin 2001, 164–70), Kelsen's theory of legal language understands the "will of the legislature" figuratively (Kelsen 1991, 273).

Kelsen privileges the language over the institutional sources by noting how an "ought" statement empowers an institution to act within certain boundaries. The statement is situated in a "chain" of other *ought-statements* that are recognisable as analysable units. This chain constrains the actions of the institutional author itself. More correctly, the conceptual referents of the signs in the chain retrospectively enclose the concepts willed by legislatures, courts, and other institutional "organs." The relevant question, for Kelsen, is not "what is the intent of the legislature?" but "what does the statement of the legislative will signify?" Further questions follow: "Do the signifying relations about the legislature's will authorise a directive?"; "What 'ought' statements authorise that signifying relation?" and so on. Again, a norm may exist long after the act of the will no longer exists (Kelsen 1991, 235).

### iii) *The State as a System of Norms*

Given Kelsen's postulate of the naturalistic fallacy, he could not consider the state as exterior to legal language. If he had done so, he would have held, like John Austin and Joseph Raz, that the legislative act, rather than the signification of the legislative act, is constitutive of the legal "is." That is, the separation of "is" from "ought" would have been traversed. Kelsen rejects such a collapse of the "is" into an "ought" and vice versa. Thus, the norms

("ought" or ascriptive statements) may only refer to other norms. The norms regulate their own creation and the creation of the institutional structure. Power is constrained by the language of the signifying structure. And that language confers authority.

Kelsen leaves one, then, with a secular state that is constructed from a language where its signification is gained from other units (i.e., signs) in the language. The signifying relations represent a totality of institutional action. Even the state itself, according to Kelsen, is subject to the interlocking chains of norms. The state is not a separate and independent author of laws, as was the case with Hobbes and Austin or with the political or religious Absolutism that Kelsen projected as his straw person. Rather, the chain of "ought" statements creates, constrains, and authorises the acts of the state. Indeed, the chain of signified objects is the state. This signifying chain defines the norm-creating authority of each institution in civil society. The chain also delineates the boundaries or *vires* of each institution. The state is not an Absolutist externality to legal language. To conceive the state is to conceive the state as an "organ" or system of organs that are empowered to act by signified relations of a sign to a cognitive object.

Accordingly, as Kelsen adds in the first edition of the *Pure Theory*, an institutional source, such as a legislature or court, is *imagined*. For the source's authorised boundary is nested in the signifying relation or chain of signifying relations: that is, in legal language (Kelsen 1992). Thus, the state is created from the legal imagination. The state is one element of a systemic unity that contradicts the dualism of the institutional model of a legal structure: state-society, public law-private law. Such a signified unity encloses all social behaviour and all political acts. The state cannot loom as a "given" over the system of norms. For this reason, Kelsen describes his theory as a "stateless theory of the state." The state is a community of officials who work in norm-creating institutions or "organs" that will cognitive objects that officials later signify through *ought-statements*. There can be no absolute God nor Nature nor Führer nor State external to the signifying relations. Accordingly, the legal "is"—that is, the language of the institutional structure—is autonomous or self-legislating. It also follows that a state, ungoverned by the rule of law, is "unthinkable."

As a consequence, the state and the people must be recognised as juridical persons in the signifying relations. The state itself is such a juridical person inside the language of the structure. Officials create or, better, "impute" the "community" as a legal person: "The 'community' is nothing but the normative order [structure] regulating the behaviour of a multitude of individuals" (Kelsen 1970, 150). So too, "ought" statements impute the State and the People (Kelsen 1970, 287). The "community" and "the People" are mere figurative descriptions for "ought" statements. To claim that "the People" exists independent of the legal language would have the consequence of deriving the analysable from the non-analysable, an "is" from an



“ought” (Kelsen 1961, 182). Once one appreciates that language displaces metaphysics as the paradigm for legal analysis, the state is not and cannot be an autonomous Absolute entity.

Norms (that is, signifying relations) empower institutions to act. Kelsen explains the importance of this point in the first edition of the *Pure Theory*: The *analysandum* “is a legal norm that governs the process whereby another norm is created, and also governs—to a different degree—the content of the norm to be created” (Kelsen 1992, 63). An ascriptive signifying relation is valid because it is recognised in the context of other signifying relations. The signifying relations empower even the state to act. As he puts it in *The Pure Theory and Analytical Jurisprudence*: “If a norm of the legal order is created in accordance with the stipulations of another norm of this legal order, then the individual who creates the law is an organ of the legal order, an organ of the state. In this sense it can be said that the state creates the law, but this means only that the law regulates its own creation” (Kelsen 1971a, 282; 1970, 286–90).

More generally, Kelsen describes the normative structure as dynamic because of the continual re-signification of norms. One norm is traced through a chain of other norms in an effort to see whether it is recognisable as an *analysandum*: “For it is a most significant peculiarity of law that it regulates its own creation and application” (Kelsen 1970, 71; 1992, 63–4). Kelsen explains in the first edition of the *Pure Theory*, for example, that “the state qua person is seen simply as the end point of a legal imputation, as a conceptual tool of specifically legal cognition [...] the state is simply an expression for the unity of the legal system, simply the personification of that legal system” (Kelsen 1992, 14). The chain of signifying relations epitomises sovereignty because, according to Kelsen, legal language is autonomous of all other languages. Its resulting structure of signifying relations (as norms) is autonomous vis-à-vis all other structures because the language, which represents the doctrines and other concepts (or rules), defers and is dependent upon other interconnected prescriptive signifying relations (or norms). The resulting legal structure is “supreme, non-derivative, and therefore non-justiciable by reference to a superior system of norms,” as Kelsen puts it in the *General Theory of Law and State* (Kelsen 1961, 411).

#### iv) *The Exclusion of Experiential Meaning*

The system of norms, constituting the state, is a self-determining totality. “No social reality can be refused incorporation in this legal category [the ought] on account of its content” (Kelsen 1934, 485). And yet, the boundary of the structure of signifying relations excludes experiential meanings. After all, Kelsen’s straw-person—the Absolute or Truth—is “profoundly rooted in feeling” (Kelsen 1973a, 109). If the constitution of meaning were included in the language, a formerly non-signifiable element of language would be

recognised as a sign. But that is impossible when language is only constituted from signifying relations.

As the official reads or hears the signs of the institutional author, Kelsen claims, the legal “is” escapes from the “boundless solipsism” of a “bottomless depth of subjectivism.” How so? Subjectivism characterises institutional sources, according to Kelsen (1961, 434, 163–4). Institutional sources represent inclinations and affective desires of the legislators and officials about the content of an enactment. Such an affectation can be “known” on a specific calendar date and territorial place where the institution expresses its will. To put this in other terms, a desire is spatio-temporally conditioned. But Kelsen distinguishes between such a contingent sense of knowledge and a rational will. Space and time—at least in territorial senses—are excluded from a will. Through this exclusion of territorial and measurable desire from the analytic project, Kelsen believed he was able to explain why certain norms were objective (Kelsen 1991, 61).

It makes sense, then, that when Kelsen describes his theory of law as positivist, his theory possesses a very special kind of positivism. The institutional author does not posit binding laws, as Hobbes and John Austin claimed. Nor does the structure of concepts rest in social conventions. Rather, a signifying relation posits how one ought to act (Kelsen 1961, 33). Kelsen describes the signifying relation as nested in an *Ideell* realm that, of course, is not quite an ideal realm as we ordinarily use that term in English with respect to the naturalistic fallacy. For the *Ideell* relation is nested in the practicality of language without which officials could not have concepts nor could institutions posit concepts (in the form of rules, doctrines, and principles). The *Ideell* is juxtaposed with the historically contingent *Realt*. An *Ideell* realm, he writes, is “intellectually concrete.” A norm is practical because a human agent imputes a referent into a statement in an historically contingent circumstance. Since the norm signifies a doctrine or other concept *cum* referent and since the latter ascribes how one ought to act, the norm is ascriptive despite its apparent practical context.

Kelsen explains the cognitively constructed reality of an “ought-statement” in such a manner in *The Idea of Natural Law* (1973b). The traditional account attributed to Kelsen has it that, first, the socially experienced circumstance is subsumed under the general norm and, second, the circumstance is nested in natural reality. But between the general norm and the natural circumstance, according to Kelsen, there is interposed the individual concrete norm created through the official’s act of signification. This so-called “subsumption” of the circumstance *under* the boundaries of the general norm is a creative act (Kelsen 1973b, 42). Kelsen reiterates this point in the *General Theory of Norms*: The “is” of a legal proposition that one “ought” to act in a certain manner is an *Ideell*, not a socially and historically contingent empirical “is” (Kelsen 1991, 164). This is not an ideal or “ought” in the anthropological sense. The *Ideell* is. It is a signification independent

of the externalised natural and social events (Kelsen 1991, 296–7). The existence of the act, as a sociological datum, differs from the signification of the act as an *Ideell* (Kelsen 1991, 306). Once a socially and historically contingent object is signified, the former is no longer analysable.

It is tempting to associate the *Ideell* realm with concepts. But only natural laws are drawn from concepts (Kelsen 1961, 163). The *Ideell* world is an “is” whose statements, as signs, represent concepts as referents. The *Ideell* is not the *Realt* of natural or social facts or of social experience. Nor does the *Ideell* involve a contemplation about the Good as Aristotle discussed at the end of the *Ethics*. Human agents cognitively construct the *Ideell* through an intellectualisation. Natural facts, social behaviour, and the quest for the Good remain exterior as impurities to the structure of the language. The interpretative act, for Kelsen, is constrained and yet interpretation involves an “infinite process” of analysis (Kelsen 1961, 434). The only reality for the legal official, Kelsen continues, is the world as it appears to us as we officials recognise statements as units in the official language.

Here, Kelsen contrasts the act of signification with the image theory of knowledge. With respect to the latter, a passive subject mirrors transcendental objects that are independent of the observer. With the interpretative act, in contrast, “*Cognition itself creates its objects*, out of materials provided by the senses and in accordance with its immanent laws” (Kelsen 1961, 434). The conformity of the product (the norm) with immanent laws guarantees the objective validity of the products. Thus, although officials construct norms through acts of signification, there is no “bottomless depth of subjectivism.” Kelsen saves himself from extreme solipsism because he understands social events as patterns or signifying structures that constrain the individual agent. As with Austin, Hart, and others, it is the postulate of a boundary of a structure that ensures the objectivity for the analytic act. The boundary of the structure is never complete, though. For the boundary could not be closed by the conscious construction of the boundary by the acts of will of institutional authors. Kelsen situates such a source in a language of signifying relations. To coin a phrase from Bert van Roermund (2000, 216)—though perhaps to use it in a different sense—the chains of signifying relations open out to a “vanishing point” where there are no recognisable objects to signify. Norms (and therefore laws) can never be fully objective as a consequence.

Despite Kelsen’s claim that chains of significations constitute legal existence, the act of signification intellectualises *about* the previously experienced social/natural world and thereby forgets about the experiential meaning. The latter is displaced as legal acts take hold. The signification, in particular, displaces experiential meaning from the constitution of the concept that functions as the revised referent of a sign. Kelsen’s association of legal norms with an act that transcends external posited facts has, indeed, a neo-Kantianism about it because of this transcendence of the signifying

relation over the constitution of meaning. Leading commentators of Kelsen have been inclined to interpret Kelsen as a Kantian or non-Kantian (Wilson 1986; Steiner 1986, 65; Paulson 2000; 1992; 1997; Heidemann 2000; Hammer 1998; Luf 1998; Nino 1998). The problem is that such an interpretation excludes the possibility that Kelsen privileges language. A theory of language, after all, is absent from Kant’s works.

Norms idealise acts of will (Kelsen 1973c, 225, fn 9). The *Ideell* departs from a sociological behaviour. But it also departs from the constitution of meaning (as opposed to signification). Meaning would involve the analysis of “acts of concept.” Rather, again, norms are significations or, more correctly, statements about significations of acts of will. As a signification, a norm itself is an *act*. Indeed, a signified object itself is an act of will. Despite its idealisation and displacement of experiential meaning, Kelsen claims that the pure theory rejects any appeal to speculative metaphysics. He is correct in the sense that the pure theory externalises the quest for the good or right action as non-analysable. But the signification about a prior legislative (or even interpretative judicial) act excludes what Kelsen calls the psychological element of the “real” legislative enactment (Kelsen 1961, 35). After all, the norm is an “ought” statement about prior historically and socially contingent behaviour in the context of other signifying relations. A rule of law is prescribed, then, without the rule having been posited by an institutional author who psychologically desired the rule. On another occasion, Kelsen makes the same point by describing the legal signification of an act as an objective “external fact” which the senses do not immediately perceive (Kelsen 1970, 2).

#### v) *The Exclusion of the Grundnorm*

To this point I have fleshed out Kelsen’s theory of “what is and what is not a unit of legality?” Legality is constituted from the inter-relations of signs, not from isolated discrete concepts *per se*. But Kelsen also or especially addresses the question, “why is a norm authoritatively binding?” And here too, as with meaning and social behaviour, Kelsen locates the authorising origin of a norm in the externality to legal language. The origin or foundation of the legal order is drawn neither from pure speculative ideas nor from social conventions nor from an articulated rule of recognition nor from institutional sources. The problem is that an ordinary norm cannot ground the authority of a norm. Yet, there has to be some finality in the legal act for the act to possess certainty and stability. To be final, the authorising origin must radically differ from an ordinary statement-concept relation (Conklin 2001, 171–200).

How could the finalising norm differ from an ordinary norm? Kelsen responds with two insights about the authorising origin of norms. First, unlike the statements about acts of will, the finality to the analysis of such

statements cannot be signifiable. For if it could, then the origin would be a unit in legal language and, as such, not differ from the latter through the signifying relations. But, being external to the language, the origin is non-signifiable and therefore inaccessible. Better put, the final grounding of legal language is inaccessible because it is not signifiable. Since concepts are not abstract objects that can be signified by transparent signs, the ultimate norm of analytic reasoning must be absent from the legal language. A pure concept is just such an object that is not coded in language. So Kelsen considers the authorising origin of the language of the legal order as an "act of thought" or *Grundnorm*. Actually, to be precise, the thought is not an act at all, but just a thought if such is possible without a sign to represent the thought.

Second, the thought, which founds legal language, is content-independent. Lacking a signification, it lacks any substantive content. Indeed, there is a sense in Kelsen's works that a concept is a mere form that lacks particulars as if the concept were like a vessel without water, the latter being the particulars. For the fundamental "concept" or "thought," the *Grundnorm*, of legal language lacks a referent: It does not signify any object. An ordinary legal act, in contrast, refers to a concept (or rule or doctrine) as its referent. If a pure concept did so refer to a further referent, the concept would no longer be an origin: Its sign would represent another object and the latter would be more final than the previous concept. The concept, lacking a referent, is not and cannot be signified as a sign. The concept is a context-less purity. Thus, the basic concept that finalises legal signification is itself unnamable and, as such, exterior to the legal language. As even Kelsen puts it, "reality" is thereby contradicted by a *Grundnorm* that is located exterior to the legal language: That is, the normative structure is constructed as if it had a territorial border and as if the *Grundnorm* were alien on the other side of the border (Kelsen 1986, 117).

### 5. The Retrospective Character of Legal Analysis

As the official analyses signifying relations, s/he reconstructs an institutional author's acts of will into an "ought-statement." This reconstruction possesses a retrospective character. Although a legislature "volitionally" enacts a statute, a judge cognitively "imputes" a concept into the legislature's enactment after the legislature posited the statute (Kelsen 1991, 244). Volition, for Kelsen, is the rational will. This retrospective signification of a referent even occurs before and independent of whether the norm may exist as an efficacious custom. The judge pictures the legislative statement retrospectively. So the relations of "ought" statements to the institution's willed concept colour the enactment with objectivity. The interpreted object is believed to bind the judge and addressee because the sign that represents the object can be traced to the recognisable configuration of legal signs. The signified criterion of the author is important: All such willed criteria of con-

cepts are legal only if one presupposes that one ought to behave in accord with the willed concept. Officials become enchained to the linkage of one sign to another. The act of signification lifts an historically and socially contingent event into a reified realm of ascriptive statements that are later structured in order to render cohesion or order to the statements. As a consequence, the imputation even retrospectively transcends unwritten customs, as much as consciously posited act of will.<sup>3</sup> A particular institutional author, such as a parliament or a court, does not enact a valid law. The legal norm, signifying such a will, validates an enactment (Kelsen 1970, 80, 5). Thus, one must carefully distinguish an act of will of an institutional author from the act of signification through which the later official retrospectively superimposes a revised conceptual referent.

The retrospective character of the act of signification is difficult to appreciate from the translations of Kelsen's writings because he describes the signification act as an "is" at the same moment that he describes the legislative act as an "is." Each is an "is." Each "exists." But the existence of each is drawn from different understandings of the legal "is." Even the will of the legislature is abstracted from the historic-psychological world through a chain of signs (Kelsen 1961, 35). A legislature, for example, wills an object. To the judge, that object is an ascriptive "ought": The norm ought to be obeyed and applied. The judge signifies the object—a concept—as the judge re-signifies the legislature's act of will into an "ought" statement. After the legislature has created the object, the judge must "know" where to situate the concept in the recognisable chain of similar ascriptive "ought" statements. The statements are "the law." The attribution of rights and duties is merely a mental operation that cleanses all bodily passion from the signification, according to Kelsen (Kelsen 1961, 313). The legislative act is objectified. Objectification is the consequence of the retrospective "practical" intellectualisation about the excluded act of will.

Thus, the fact that a legislature or a court posits an order does not ensure the validity of that order. No. The assurance is not even guaranteed if the legislature or court claims an authority for its order because of the source of the order on the bureaucratic institutional structure as Raz claimed. Nor

<sup>3</sup> It is important to bear in mind that the *Grundnorm* may presuppose an unwritten, custom-based constitution just as it may presuppose a written constitution posited as a distinct act of writing. In either case, the *Grundnorm* presupposes that subjects ought to obey either constitution, whatever the content of the constitution. The presupposition allows for the self-conscious posit of the written constitution or the evolution of custom "as law-creating fact." The constitution "elevates" the subjective meanings of a legislature or of the Founding Fathers to objective significations in legal language. The objectivity of the signification constitutes a juridical fact—at least until one accesses the opening in the boundary of the structure of norms, an opening where the exterior *Grundnorm* is imagined rather than signified. The *Grundnorm* must be imagined precisely because it dwells in a language-less realm. Whether an object can be imagined where there is no language to signify it, I leave to the side for the purpose of this essay.

does the fact that some king or Führer authors the order assure that the order is legally valid. A norm is valid *after* an official has signified the legislature's or court's statement that expresses the order. Kelsen calls the later signification of the initial order a norm. The norm, as a signification, contrasts with the cognitive object about which the signification refers. Validity goes to the official's re-reading of the sign that represents the intended referent, not to the intended referent itself. The official recognises the sign as valid by differentiating it from other signs that are already recognised as valid. Each norm presupposes a prior (not necessarily in time) norm that, in turn, presupposes a prior norm until one presupposes one silent final basic pure concept or *Grundnorm*. Such a concept is located exterior to the language because it lacks a sign to represent it. The basic concept is not really a norm because it cannot be signified in legal language.

As the signs of the institutional authors are recognised in a chain of signifying relations (that is, "ought" statements), the willed concept may be forgotten although the original signs may remain in the discourse. If the will were not forgotten, the socially and historically concrete event of the willing author would be repeated as a sign in the "ought" statement. The "ought" signification would be impure. Instead, the signification relations or chains of "ought" statements displace the act of will of the author. Legally binding instruments can no longer be said to be the commands of a sovereign author, whether that author be a legislature, a court, or a subordinate authority. For any one author is an institutional "organ" whose authority to impose its will is constructed from a pre-existing chain of "ought" statements. Any one norm takes its signification from the "ought" statements of another norm about the original intent of the legislature or court. From the signifying chain, there evolves a corresponding structure of doctrines (what I have discussed as "concepts") that the signs represent. The *representation* of a legislated act of will thereby phenomenologically and logically pre-exists the act of will. Yet the act of cognition, the interpretative act, is retrospectively superimposed upon the signs that represent the institutional author's act of will. Again, what begins as a supplement to an originally legislated enactment becomes a supplement to another supplement (Kelsen 1970, 131). And the original legislative act is displaced, though the act of displacement may well succeed in the name of the will of the legislature. Thus, the "system" about which Kelsen writes is not a system of empty discrete analysable concepts. The legal order is constituted from relations between signs and concepts which gain their signification from other recognised sign-concept relations.

Poets and novelists may prescribe directives. But what renders a court's or legislature's directives legally valid is that the latter sources are "competent to create valid norms." The reason for the validity of their norms is the nexus of the norms to higher norm-creating authorities and, ultimately, to an interconnected language. The interpreter transforms a concept into a legal

doctrine which Kelsen describes as Reason (Kelsen 1991, 6). The norm is empowered. Empowerment involves the validity to posit a norm; it is not the norm itself (Kelsen 1970, 103). A norm may be cognitively connected to a system of norms, but it is not a legal norm unless the interpreter's position is coloured with the empowerment to decide and to apply norms. More correctly, an institutional author (which includes an interpreter with empowerment) need not in fact articulate a willed referent nor, indeed, must there even be such an institutional author: The interpreter may only imagine *as if* an institutional author had posited the norm. A norm is valid, then, because it has been posited pursuant to a procedure that can be traced to higher norms and, ultimately, to constitutional norms that constitute the historically contingent reason for the validity of the procedure.

It is important to realise that language-creating organs share configurations of "ought" statements that they can recognise. Such written communication, not concepts that are expressed through a transparent configuration of signs, defines who is a member of the juridical community. A person is a member of a legal community "because and insofar as his function is determined by a norm of the legal order that constitutes the community and can therefore be attributed to the community" (Kelsen 1970, 234). Such a community signifies its own language in terms of recognisable norms. Ultimately, the language ought to prevail over other languages even if the signifying relations that validated the norms cease to exist. The law teacher's role in all this is merely to de-scribe the writing (*de* signifies "from," "out of," "after," and *scribere* signifies "to write"), not to evaluate or to prescribe the content of the signifying relations (Kelsen 1970, 73, 79). The scholar decomposes or analyses the formal relations of signs to doctrines; the scholar does not evaluate or prescribe the content.

### Conclusion

For Kelsen, legality begins and ends with language. Language connotes what is inside and outside the boundary of legality. That said, what is not analysable cannot be recognised as a unit of legal language without officials knowing what is excluded from the language. The excluded elements include experiential meaning and the origin of the language. Ultimately, then, the legal language is coercive against all meaning as well as the origin of legality itself.

We are left with one question. Kelsen argues that legality is not constructed by a legislature or a court. Rather, legality is created as an official *interprets* authorial acts of will that are situated in chains of statement/concept relations. But a basic norm, exterior to such a language, is believed to unify the language into a coherent structure. In order to unify isolated signs, the basic norm must radically differ from an ordinary norm, however. One non-signifiable "concept" unifies legal language. This is the *Grundnorm*.

Officials interpret norms as they gaze towards the non-signifiable and, therefore, non-analysable and inaccessible exteriority to the normative structure. The *Grundnorm* is located in such an objectless nothing. Paradoxically, the legal order depends upon the non-signifiable exteriority for the identity of signifying relations. The purity of the language may not be so pure after all. And yet, the purity of the language is claimed at the cost of excising the embodiment of meaning from legal language.

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