

LEGAL-PHILOSOPHICAL PROPOSITIONS

Proof of and impetus to a Kelsenian ‘Legal-Philosophical Tractate’ analogous to Wittgenstein’s *Tractatus Logico-Philosophicus*

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It is possible to write a Kelsenian ‘Legal-Philosophical Tractate’ – based on Kelsen’s *Pure Theory of Law*¹ – after the example of Wittgenstein’s *Tractatus Logico-Philosophicus*.² The following main and sub-propositions analogous to the main and sub-propositions of the *Tractatus* are a proof thereof and give an initial impetus to it: “May others come and do it better”.³ Unlike Wittgenstein’s *Tractatus*, that ends with the famous proposition 7 that one should be silent about what cannot be spoken, a Kelsenian Tractate would not end with an analogous main proposition, but with two sub-propositions that show the (relative) value of both ‘the speaking’ and ‘the silence’ of positive law.

1. *The world is everything that is the case.*
 - 1.1 *The world is the totality of facts, not of things.*
 - 1.2 *The world divides into facts.*

A. Positive law is everything⁴ that legally ought⁵ to be the case.

A.1 Positive law is the totality of legal norms, not of facts nor of morals.⁶

A.2 Positive law, the positive legal system, divides into legal norms.⁷

2. *What is the case, the fact, is the existence of [actual]⁸ connections.⁹*
 - 2.1 *We make to ourselves pictures of facts.*
 - 2.2 *The picture has the logical form of representation in common with what it pictures.*

B. What legally ought to be the case, the legal norm, is the validity¹⁰ of normative (or ‘imputative’) connections.¹¹

B.1 We make to ourselves pictures of legal norms.¹²

¹ Kelsen’s *Pure Theory of Law* is worked out, inter alia, in his *Pure Theory of Law* (1934) hereafter: IPLT and (1960) hereafter: PTL, *General Theory of Law and State* (1945) hereafter: GTLS, and *General Theory of Norms* (1979) hereafter: GTN.

² I use the first English translation of the German original: Wittgenstein, *Tractatus Logico-Philosophicus*, translated by C.K. Ogden & F.P. Ramsey (1922). I restrict myself to its logically/hierarchically most important propositions, namely: 1, 1.1-1.2, 2, 2.1-2.2, 3, 3.1-3.4, 4, 4.1-4.4, 5, 5.1-5.4, 6, 6.1-6.4, and 7.

³ A quote from Wittgenstein in the preface to his *Tractatus*.

⁴ The unity of international law and state law means – ultimately – that positive law is *world* law; see Kelsen, IPLT, Ch. IX, par. 50 and Kelsen, PTL, Ch. VII, par. 43-44.

⁵ “‘Ought’ as designating a category of the law”; see Kelsen, IPLT, Ch. III, par. 11.

⁶ Law and nature (facts) as well as law and morality (morals) are separated; see Kelsen, IPLT, Ch. I-II and Kelsen, PTL, Ch. I-II.

⁷ “The law *qua* system – the legal system – is a system of legal norms”; see Kelsen, IPLT, Ch. V, par. 27.

⁸ For Wittgenstein the world is *only* the totality of existent, i.e. ‘actual’, atomic facts or connections.

⁹ With regard to the translation of the German word “Sachverhalten”, I use the word “connections” instead of “atomic fact” following the Dutch translation of Wittgenstein’s *Tractatus*, transl. W.F. Hermans (1989).

¹⁰ “‘Validity’ is the specific existence of a norm, an existence different from that of a natural fact”; see Kelsen, GTN, Ch. 1, par. V. See also Kelsen IPLT, Ch. I, par. 6, and Kelsen, PTL, Ch. I, par. 4c.

¹¹ “Expressing this connection, termed ‘imputation’, and thereby expressing the specific existence, the validity, of the law – and nothing else – is the ‘ought’ in which the *Pure Theory of Law* represents the positive law”; see Kelsen IPLT, Ch. III, par. 11(b). See also Kelsen, PTL, Ch. III, par. 18 and Kelsen, GTN, Ch. 6-7.

¹² “The norm as scheme of interpretation”; see Kelsen, IPLT, Ch. I, par. 4, and Kelsen, PTL, Ch. I, par. 4a.

B.2 The picture has the normative form of representation in common with what it pictures.

3. *The logical picture of the facts is the thought.*

3.1 *In the [Is-]¹³ proposition the thought is expressed perceptibly through the senses.*

3.2 *In [Is-] propositions thoughts can be so expressed that to the objects of the thoughts correspond the elements of the propositional sign.*

3.3 *Only the [Is-] proposition has sense; only in the context of the [Is-] proposition has a name meaning.*

3.4 *The [Is-] proposition determines a place in logical space: the existence of this logical place is guaranteed by the existence of the constituent parts alone, by the existence of the significant [Is-] proposition.*

C. The normative picture of the legal norms is the act of will.¹⁴

C.1 In the Ought¹⁵-proposition the act of will is expressed perceptibly through the senses.¹⁶

C.2 In Ought-propositions acts of will can be so expressed that to the objects of acts of will correspond the elements of the propositional sign.

C.3 Only the objective Ought-proposition has legal sense, i.e. is valid; only in the context of the objective Ought-proposition has a subjective act of will an objective meaning.¹⁷

C.4 The valid Ought-proposition determines a place in normative space: the validity of this normative place is guaranteed by the validity of the hierarchically ‘higher’ placed, significant Ought-proposition.¹⁸

4. *The thought is the significant [Is-] proposition.*

4.1 *The [Is-] proposition presents the existence and non-existence of [actual] connections.*

4.2 *The sense of the [Is-] proposition is its agreement and disagreement with the possibilities of the existence and non-existence of [actual] connections.*

4.3 *The truth-possibilities of the elementary [Is-] propositions mean the possibilities of the existence and non-existence of [actual] connections.*

4.4 *The [Is-] proposition is the expression of agreement and disagreement with the truth-possibilities of the elementary [Is-] propositions.*

D. The objective act of will is the significant, i.e. the valid, Ought-proposition.¹⁹

D.1 The valid Ought-proposition presents the validity and non-validity of normative (or ‘imputative’) connections.

¹³ For Wittgenstein only factual propositions about being or existence, i.e. ‘Is’-propositions, are significant. He denies that ‘Ought’ has any meaning. See also Kelsen, GTN, footnote 62, in which he refers to Wittgenstein.

¹⁴ “The Ought – the norm – is the meaning of a willing or act of will, (...) an act whose meaning is that another person (or persons) is to behave in a certain way”; see Kelsen, GTN, Ch. 1, par. III.

¹⁵ “[A]n ought sentence is not meaningless. The person who utters it means something, and the person to whom it is addressed can understand it.”; see Kelsen, GTN, footnote 62, in which he refers directly to Wittgenstein.

¹⁶ An imperative or Ought-sentence (a command or prescription) is the sensory perceptible linguistic expression of a norm; see Kelsen, GTN, Ch. 1, par. III.

¹⁷ “Generally: not every Ought which is the meaning of an act of will is a binding *norm*. (...) It is only when the Ought has an objective meaning, and so expresses a command, that there exists a duty (i.e. a binding norm)”; see Kelsen, GTN, Ch. 8, par. V. See also Kelsen, IPLT, Ch. I, par. 3, and Kelsen, PTL, Ch. I, par. 3.

¹⁸ “The Ought which is the subjective meaning of an act of will is also the objective meaning of this act, if this act has been invested with this meaning, if it has been authorized by a norm, which therefore has the character of a ‘higher’ norm”; see Kelsen PTL, Ch. I, par. 4b.

¹⁹ See footnotes 14-15.

D.2 The validity of the Ought-proposition determines the possibilities of the validity and non-validity of normative (or ‘imputative’) connections.

D.3 The validity-possibilities of the ‘higher’ Ought-proposition determine the possibilities of the validity and non-validity of the ‘lower’ Ought-proposition.

D.4 The validity or non-validity of the ‘lower’ Ought-proposition is the expression of the validity-possibilities of the ‘higher’ Ought-proposition.

5. *The [Is-] proposition is a truth-function of the elementary [Is-] propositions. (The elementary [Is-] proposition is a truth-function of itself.)*

5.1 *The truth-functions can be ordered in series. That is the foundation of the theory of probability.*

5.2 *The structures of [Is-] propositions stand to one another in internal relations.*

5.3 *All [Is-] propositions are results of truth-operations on the elementary [Is-] propositions. The truth-operation is the way in which a truth-function arises from elementary [Is-] propositions.*

5.4 *Here it becomes clear that there are no such things as ‘logical objects’ or ‘logical constants’ (in the sense of Frege and Russell).*

E. The ‘lower’ Ought-proposition is a validity-function of the ‘higher’ Ought-proposition. (The ‘highest’ Ought-proposition, the presupposed Basic Norm, is a validity-function of itself.)

E.1 The validity-functions can be ordered in hierarchical levels. That is the foundation of the *Stufenbau*-theory.²⁰

E.2 The validity-structures of the ‘higher’ and ‘lower’ Ought-propositions stand to one another in formal relations.

E.3 All ‘lower’ Ought-propositions are results of validity-operations on ‘higher’ Ought-propositions. The validity-operation is the way in which a validity-function arises from ‘higher’ Ought-propositions.

E.4 Here it becomes clear that there are no such things as a ‘material Basic Norm’ and ‘material validity’ (in the sense of the Natural Law-theory).

6. *The general form of truth-function is: [‘Such and such is the case.’]²¹ This is the general form of [Is-] proposition.*

6.1 *The propositions of logic are tautologies.*

6.2 *Mathematics is a logical method. The propositions of mathematics are equations, and therefore pseudo-propositions.*

6.3 *Logical research means the investigation of all regularity. And outside logic all is accident.*

6.4 *All [Is-] propositions are of equal value.*

F. The general form of the Ought-proposition is: ‘If such and such conditions are fulfilled, then such and such a sanction ought to take place.’²²

F.1 Relative values, which can be realized within the positive legal system, are tautologies.²³

²⁰ The *Stufenbau*-theory is the doctrine of the hierarchical structure of the legal system; see Kelsen, IPLT, Ch. V, par. 31, and Kelsen, PTL, Ch. V, par. 35.

²¹ Cf. proposition 4.5 of the *Tractatus*.

²² See Kelsen, PTL, Ch. III, par. 16.

²³ See Kelsen, PTL, Ch. II, par. 11.

F.2 Absolute values, which are located outside the positive legal system, are transcendent and therefore nonsensical values.²⁴

F.3 Normative research of positive law means the investigation of all legality and lawfulness. And outside positive law all is arbitrary.

F.4 All Ought-propositions are of equal value.

7. *Whereof one cannot speak, thereof one must be silent.*

G. Regarding absolute justice, about which one cannot speak, one must be silent.

G.1 Where legal judgements fail, war begins.²⁵

G.2 Where positive law is silent, one is legally free.²⁶

Afterword to a Kelsenian Tractate:²⁷

The point of Kelsen's *Pure Theory of Law* is also an ethical one. His legal theory consists of two parts: the one presented by Kelsen plus all that he has not written. And it is precisely this second part that is just as much important. The *Pure Theory of Law* draws limits to the sphere of the ethical value of positive law from the inside as it were, and Kelsen was convinced that this is the only PURE way of drawing those limits. In short, Kelsen believed that where many others are disputing – and if necessary with violence – about (absolute) justice, he had managed in his *Pure Theory of Law* to put everything firmly into place by being silent about it.

²⁴ See Kelsen, PTL, Ch. II.

²⁵ See Kelsen, GTLS, Part I, Ch. I, par. A (c4-5), par. B (g). Cf. “Ubi iudicia deficiunt incipit bellum”, Grotius, *On the Law of War and Peace*, Bk II, Ch. 1, par. 2.

²⁶ See Kelsen, PTL, Ch. I, par. 4(d) and GTN, Ch. 31.

²⁷ This afterword is analogous to a well-known passage of Wittgenstein's letter to Ludwig von Ficker (dated 20 October 1919) in which he writes about the ethical meaning of his *Tractatus*.