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A Kelsenian-Inspired Explanation of Patients' Right to Informed Consent

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ABSTRACT. Subjective rights enjoy limited import in Kelsenian theory for whereas the concept of duty underlies every legal norm, that of rights is merely possible and only emerges when the imposition of the sanction attached to the breach of the duty is made dependent upon a subject's will to bring legal action. The presence of secondary norms establishing certain duties of medical professionals on informed consent displays the existence of correlative reflex rights of patients. Yet, together with secondary norms, Western legal systems typically institute norms of competence enabling patients to take legal action when those duties correlative to their reflex right to informed consent have been infringed. Thus, informed consent constitutes a set of subjective legal positions of patients and medical professionals. Despite its excessive formalism and questionable neutrality, the Kelsenian approach permits to define and clearly distinguish patients' genuine rights from mere aspirations devoid of legal basis.

KEYWORDS. Informed consent · Kelsen · legal duties · legal norms · subjective rights.

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I. ON THE KELSENIAN APPROACH TO SUBJECTIVE RIGHTS

In the opinion of Hans Kelsen, conceptual dualism that distinguishes between an objective and a subjective scope of law is blatantly ideological and unacceptable, for it entails a wrong presupposition about the existence of rights prior to the establishment of the legal system, thus consisting the function of this latter in the sheer recognition of such pre-existing entities at the risk of turning into an unjust legal regime. Kelsen's analysis starts from the notion of legal norms as legal statements to end up with an appurtenant idea of subjective rights imbedded in the wider and all-encompassing concept of legal order, initially identified with the State by the Austrian Professor. Along these lines, the concept of subjective rights appears as superfluous and a merely possible, yet not

necessary, legislative technique in the hands of the lawmaker for devolving the creation of individual norms.

Kelsen initially adopted a static stance according to which legal theory is only concerned with the analysis of general legal norms. All the same, he also embraced the questions of law creation and unity later on, thus incorporating a dynamic and conceivably more voluntarist outlook to his approach.[1] Still, Kelsen emphasised the coercive character of all legal norms for their application always involves a coercive act. Within this latter category, especially important is the sanction, understood as a primary legal concept consisting in a coercive deprivation of a good as the legal consequence of a behaviour that equates to the breach of a legal duty and, hence, an unlawful act.[2]

Kelsen was very critical towards various doctrines on the acquisition of subjective rights. Concretely, he took a stance against the iusnaturalist conception as a whole, the interest theory of Rudolf von Ihering, Bernhard Windscheid's will theory, and the combination thesis formulated by Edmund Bernatzik. By the same token, Kelsen opposed John Austin's analytic jurisprudence and the Marxist doctrine of Georg Puchta and Evgeni Pasukanis. In Kelsen's opinion the legal norm is first and foremost individualised through legal duties,[3] whereas the current pervasive preference for the concept of subjective rights derives from the triumph and generalisation of iusnaturalist trends. However, Kelsen held that the iusnaturalist idea of justice actually belongs to an extra-juridical dimension that contaminates the legal theory with meta-legal aspects. In Kelsenian theory, it is inappropriate to discriminate between the objective and subjective dimensions of law, being the concept of subjective rights an iusnaturalist notion that confuses the perimeter outside state legislation with a legitimate power. Within Kelsen's approach this is a mistake for a subjective right only mirrors the existence of a legal duty, which actually is the sole indispensable legal concept. All in all, such mistake would originate in an inadequate identification of a legitimate power with a legally irrelevant reality.[4]

1. The Subjectivisation of Law

In *Main Problems in the Theory of Public Law,* Kelsen addressed the subjectivisation of law through the norm from the assumed identity and unity of the former, along with its two-fold public and private nature. According to Kelsen, subjective rights are not substantive

[1] H. Kelsen, General Theory of Law and State, New York: Russell & Russell, [1949] 1961. G. Robles, Hans Kelsen. Vida y obra, Cizur Menor: Civitas-Thomson Reuters, 2014 at 14. J.A. García Amado, Hans Kelsen y la norma fundamental, Madrid: Marcial Pons, 1996 at 19.

[2] H. Kelsen, Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit, 2. Auflage, Vienna: Verlag Franz Deuticke, 1960. English trans.: Pure Theory of Law, 2nd ed., Max Knight (trans. from the 2nd rev. and enl. German ed.), Peter Smith (ed.), Gloucester, Mass.: University of California Press, [1960] 1989 at 108 and 146.

[3] H. Kelsen, Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze, Aalen: Scientia Verlag, [1911] 1984. Spanish trans.: Problemas capitales de la teoría jurídica del Estado: desarrollados con base en la doctrina de la proposición jurídica, W. Roces (trans.), Mexico: Porrua, 1987 at 379.

[4] Ibid. at 495–6.

but formal entities. The legal norm is subjectivised when the imposition of a sanction is made available to a subject by means of a legal action (*actio*), although the success of such mechanism is always dependent upon the conditions established in the legal norm and the State's will. Accordingly, two complementary wills necessarily converge in a subjective right—namely, the primary will of the State that institutes a certain behaviour as due and from which a subjective 'reflex right' derives, and the will of the subject to whom the legal order confers a power to claim the observance of the correlative legal duty comprised in the legal norm, that is, a subjective 'right in the technical sense.' For its part, the granting of this power to exercise a legal action entails the duty of the State to impose the sanction in case such legally mandatory behaviour were infringed. Still, the establishment of this sort of duties through a legal norm does not entail two separate subjective rights, but they are only two expressions of a same legal norm, although Kelsen himself turned to this conceptual duality to refer to the right to claim and the right to execution by the State, respectively.[5]

Kelsen identified the idea of subjective rights with the power to bring legal action. Thus, the ascertainment of the fact envisaged in the norm triggers the emergence of a subjective right, in which Kelsen did not only include the illegal behaviour, but also the personal qualities of the parties involved in the legal relationship (personal element) and other attendant circumstances comprised in the norm (material element).[6] Hence, the subjective right would be in a potential or even latent state that, once the illegal conduct materialised and the legal action brought, becomes actual through the imposition of the sanction.[7] Consequently, in Kelsen's view the subjective right coincides with the legal norm, being the latter identified from its specific relationship with the subject. Therefore, the subjective right is nothing but a derivation of law in an objective sense or legal order, being only possible to assert the existence of a subjective right when the norm provides a subject with the means to enforce its content.[8]

Similarly, Kelsen rejected the traditional classification of law in public and private for such differentiation includes a conception of the end as a criterion intended to produce purely formal concepts, thus intertwining incomparable realities. Besides, a norm can be oriented towards either public and private ends. Under Kelsen's viewpoint, subjective rights have a public nature because all are devoted to the safeguard of the general interest, while they display a private nature when regarded from a subjective perspective, that which is manifest in those cases wherein the norm bestows on the titleholder a power to claim the observance of the correlative legal duty or, in case of complete breach, the imposition of the corresponding sanction by the State. Accordingly, it is not possible to conclude a fully private character of subjective rights.[9]

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[5] Ibid. at 539–46.
[6] H. Kelsen, [1949] 1961 at 90–1.
[7] H. Kelsen, [1911] 1987 at 545–7.
[8] Ibid. at 539–40.
[9] Ibid. at 550.

2. The Legal Norm

In Kelsenian theory, subjective rights (if any) derive from duties established in legal norms. Against this conceptual background, only norms and duties are primary legal concepts. However, Kelsen's notion of legal norms was evolving throughout his works.[10] In *Main Problems,* Kelsen regarded the legal norm as a hypothetical judgment that directs the exercise of the State's conditional will and introduces the coercive element by imposing the sanction.[11] Yet, in the first edition of *Pure Theory of Law,* Kelsen cast this conception aside to understand the legal norm as an interpretative structure endowed with meaning (*Sinngehalt*), while distinguishing between 'primary norms' instituting a relation that involves the illegal act and the sanction, and 'secondary norms' devoted to state the behaviour in which the illegal act consists and inform on how to avoid the sanction.[12] In *General Theory of Law and State,* Kelsen highlighted the unavoidably coercive character of norms integrating the legal order. In this sense, primary norms establish sanctions whose imposition, in turn, is subordinated to the concrete conditions instituted by secondary norms, that which involves a relationship of deontological dependency between both, being possible to express such legal norms in various ways and not only as hypothetical judgments.[13] In the second edition of *Pure Theory,* Kelsen gave up the distinction between primary and secondary norms, while spreading his concept of legal duty to imperative, permissive, facultative, and derogatory norms, labelling them as 'dependent legal norms,' insofar as subordinated to those norms establishing sanctions.[14] Nevertheless, in *General Theory of Norms,* Kelsen picked up the classification between primary and secondary norms once again, although emphasising their unity and acknowledging the superfluous character of secondary norms, since the behaviour permitting to avoid the sanction is already implicit in the primary norm.[15]

Although for Kelsen all legal norms have a public scope, he conceded that a legal norm enjoys a relatively private character when its enforcement is made dependent upon a subject's will to bring legal action, yet public law unvaryingly encompasses its private sphere. Furthermore, Kelsen distinguished between norms in the broad sense that establish a duty of the State, and norms in the strict sense laying down subjects' duties together with sanctions and enforcement measures. By contrast, Kelsen turned down the differentiation between norms enshrining subjective rights of the State and those others shaping subjective rights, given that what is actually relevant in a legal relationship is not the titleholder's position but the debtor's one. In view of the foregoing, Kelsen distinguished between norms conferring subjective rights against the State and norms

[10] J.A. Cruz Parcero, El concepto de derecho subjetivo en la teoría contemporánea del Derecho, Mexico: Fontamara, 1999 at 37. Walter, R., Las normas jurídicas, *Doxa* 2, 1985: 107–15.
[11] U. Schmill, 'Prólogo', in H. Kelsen, [1911] 1987 at XVI ff.
[12] H. Kelsen, Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik, 1. Auflage, Vienna: Verlag Franz Deuticke, 1934. Spanish trans.: Teoría pura del derecho. Introducción a la ciencia del derecho, Tejerína (trans. from the 1st German ed.), Mexico: Editora Nacional, 1979 at 58.
[13] H. Kelsen, General Theory of Law and State, New York: Russell & Russell, [1949] 1961 at 46.
[14] H. Kelsen, [1960] 1989 at 56.
[15] H. Kelsen, Allgemeine Theorie der Normen, Vienna: Manz, 1979. Spanish trans.: Teoría General de las Normas, Hugo Carlos Deloy y Jacobs (trans. from the 1st German ed.), Mexico: Trillas, [1979] 1994 at 148.

bestowing subjective rights against other subjects, both included in the category of legal norms in the strict sense, for only they lay down subjects' duties correlative to rights either of other subjects or the State. Besides, Kelsen reflected on the possibility of deriving subjective rights against the State from other legal norms in the broad sense, that is, norms establishing rights of the State. In Kelsen's view, the answer to this question begins from the recognition of the formal difference between legal duties of the State and those falling to subjects because, whereas the unlawful behaviour of the State is unconceivable, the breach of the law by the subjects constitutes the baseline.[16] Thus, it would be only possible to regard as subjective rights against the State those legal norms establishing a duty of the State whose enforcement is dependent upon a subject's claim.[17]

In *General Theory of Norms,* Kelsen reiterated his equation of law to sheer legality, since he conceived that the object of legal norms always deals with human behaviour, yet these norms do not state how humans behave but how they ought to behave in certain situations, being the unlawful behaviour what contradicts the legal norm and not the human being itself.[18] In this sense, the addressee of a legal norm either permitting or banning a concrete behaviour is always the human being, whereas this latter becomes the material object of the legal norm when a sanction is ascribed to its infringement. This way, Kelsen pointed out that the mission of the legal norm is not only to describe a certain behaviour, but mainly to prescribe such behaviour that, for its part, may be either active (action) or passive (omission). Additionally, Kelsen admitted that legal norms can be empowering norms, that which is frequently translated into the ownership of a subjective right. The fact is that, all norms necessarily create duties because, even when according powers, they must be correlatively addressed to the counterparty. Accordingly, concept of legal duty gathers all normative functions, being suitable for either commanding, empowering, permitting, and derogating.[19]

When a legal norm establishes a behaviour as due, it also introduces a sanction for the case of its infringement. If the behaviour consists in the performance of an action, the sanction will be applied if the debtor omits it; whilst when the behaviour lies in an omission, the performance of the action will trigger the imposition of the sanction. Kelsen deployed the concept of permission to refer to anything falling outside the application scope of the norm and, therefore, legally irrelevant. Nonetheless, he also used the concept of permission to point out that the validity of a norm declines when another norm either completely or partially repeals the content of the former, so that what was previously prohibited becomes permitted. Legal powers and permissions have different normative functions. A power endows the subject with competence to establish and enforce certain legal norms. If a subject carries out an unauthorised act, such act will not produce legal effects at all, save the behaviour being prohibited in which case the pertinent sanction will be imposed. As to law-creating acts, if the legal norm neither empowers nor

[16] H. Kelsen, [1911] 1987 at 572–3.
[17] Ibid. at 577–8.
[18] H. Kelsen, [1979] 1994 at 99.
[19] Ibid. at 106–7.

proscribes, then the concrete act displays no legal effect and is, consequently, legally irrelevant. Moreover, powers can entail a decree when the establishment of norms is authorised or competences demanding an act of obedience are instituted.[20]

Legal norms establish the worth of certain human acts by ordering either their performance or omission.[21] Accordingly, legal rights are a set of hypothetical judgments instituting duties and obligations through the introduction of a sanction whose imposition is linked to the unlawful behaviour, while permitting certain individual conducts. It is precisely the sanction what makes possible to talk of subjective rights, since the inclusion of the subject's will within the conditions for the application of the legal norm is what permits to assert a right of the subject correlative to the corresponding legal duty. In Kelsenian theory, the concept of subjective rights may encompass either a free behaviour (negative permission) or a right correlative to an obligation of identical content (reflex right), being the subjective right proper the power to claim the compliance with the duty or the imposition of the sanction.[22]

Considering that Kelsen depicted subjective rights as the legal protection of certain interests through an empowering norm, Kelsenian subjective rights are nothing but powers to partake in the construction of the legal order by triggering the issuance of a judicial decision, understood the latter as an individual legal norm. However, Kelsen conceived the bestowal of such powers as a mere legal technique, since only duties are actually indispensable, being possible to impose the sanction ex officio. This way, Kelsen emphasised the normative character of judicial decisions, insofar as individual norms establishing behavioural patterns along with a sanction to be applied in case of infringement. Similarly, political rights enable subjects' participation in the creation of law, being the duties of electoral public servants their counterparty. Whereas subjective rights are the characteristic mechanism operated by capitalist legal orders to allow the participation of subjects in the state will, political rights are typical participatory tools deployed by democratic forms of government.[23]

3. The Legal Duty

According to Kelsen, the difference between legal norms and legal duties reside in the adoption of a dual stance that, in turn, discriminates between an objective and a subjective scope when conceptually analysing law. Legal duties enjoy prominent independency in the Kelsenian explanation for they represent the primary and actually genuine manner in which the law manifests, being impossible to talk of legal norms without legal duties. On the other hand, not every legal duty unavoidably entails correlative rights, but the latter only express a further, optional way of legal

[20] Ibid. at 111–3.
[21] Ibid. at 135.
[22] Ibid. at 141–2.
[23] H. Kelsen, [1949] 1961 at 89.

subjectivisation. Accordingly, the essential function of the legal norm is the establishment of legal duties.[24]

In *Main Problems,* Kelsen defined the concept of subjective rights from their distinction from duties while conceptually prioritising the latter, that which lead him to a subsequent definition of subjective rights as legal entities with scarce autonomy. In this sense, Kelsen deployed the concept of subjective rights as mirroring the legal duties of the counterparty or, in other words, a reflection of the legal order in an objective sense. It was no before *General Theory of Law* when Kelsen explicitly enunciated his distinction between reflex rights (nomostatic approach), and subjective rights in the technical sense understood as powers to participate in the construction of the legal order (nomodynamic approach). Nonetheless, such conceptualisation underlies his life's works. For Kelsen, the primary source of subjectivisation comes from the duty of every citizen to respect and obey the law, whilst the subjective right is only secondary and elective. Despite this, both forms of subjectivisation entail a relationship whereby a subjective right always corresponds to a correlative duty of the counterparty. Although every norm establishes duties, not every norm enshrines subjective rights, but that only happens when the production of legal effects or the imposition of the sanction is made dependent upon the exercise of a legal action by a subject. In view of the foregoing, Kelsen concluded that, whereas legal duties are a legally necessary subjective modality, subjective rights are only possible and a legal technique at the disposal of the legal order. These reasons advise the redirection of the language of rights to that of duties.

Regarding the circumstances that enable the imposition of the sanction by the State or implementing measures as provided for in the law, Kelsen differentiated the description of the unlawful behaviour from the legal action in the titleholder's hands. Kelsen included all actions and omissions that result in an illegal conduct within the description of the unlawful behaviour, further distinguishing between personal normative conditions allowing the adscription of an obligation or right to a concrete subject, and attending normative conditions consisting in a concrete act or omission without which neither the duty nor the subjective right will emerge. When both types of conditions are met, the subjective duty and correlative right arise. Thus, the subjective right exists from the realisation of the factual situation to the completion of the unlawful behaviour, yet titleholders can only exercise their subjective rights by taking legal action once the illicit conduct has been consummated.[25]

Both in the first edition of *Pure Theory* and in *General Theory of Law,* Kelsen defined the legal duty as the validity of a legal norm that establishes a sanction to be applied in the case of contravention, so that the legal duty coincides with the legal norm on its relationship with the debtor. The conduct in which the unlawful behaviour consists is the condition for the imposition of the sanction and the content of the legal duty, that is, the duty to obey the legal norm.[26] Kelsen actually conceived the legal duty to behave in a

[24] H. Kelsen, [1911] 1987 at 271–2 and 303.
[25] Ibid. at 547.
[26] H. Kelsen, [1949] 1961 at 59.

certain way as something equal to the objective content of the legal norm that commands an individual conduct at the risk of satisfying the applicability conditions of the sanction. In this vein, Kelsenian legal obligations are exclusively linked to a positive legal order and completely emancipated from the moral sphere.[27] Along these lines, in *General Theory of the Norm,* Kelsen expressly pointed out that a subjective right cannot give way to a moral obligation, because a moral duty can only be imposed through the moral order yet not so by means of a legal system. Furthermore, a duty is never derived from a subjective right, whether it is a reflex right correlative to a legally mandatory behaviour whose inobservance is the condition for the imposition of the sanction, or a legal power for claiming the observance of the legal duty through the exercise of a legal action.[28]

The second edition of *Pure Theory* is an authentic reworking of the first edition given that not only the structure of the work was altered, but also its contents. For Kelsen, law is to be translated to a coercive legal order devoted to regulate human behaviour and endowed with unity because all legal norms share the same foundation of validity. The coercive element of law derives from the State's ability to react against infringements, by imposing a burden on offenders and using physical force in case of resistance to the application of the sanctions provided for in the legal norms.[29] In this sense, Kelsen envisioned an intrinsic relationship between the concepts of sanction and illegality, being the former the consequence of the latter, whereas illegality is the condition for the imposition of the sanction. Conceived as the consequence of an unlawful behaviour, sanctions can consist of a punishment (penal sanction) or the execution of the norm's content (civil sanction).[30]

Despite its name, civil sanctions have an eminent restorative function for they are intended to put an end to the state of affairs derived from the illegal behaviour and re-establish the situation according to law, which could consist in the reparation of the damage and, therefore, be closer to pecuniary sanctions, although this latter have no restorative function. Furthermore, sanctions can display a dissuasive role, so preventing the commission of the unlawful conduct thanks to the redistributive character of the sanction, understood this latter as the logical aftermath of the unlawful action. For Kelsen, the sanction was not a meta-legal element, but a simple condition imposed by the legal order and, consequently, a component of law. Besides, the sanction is intimately related to the concept of legal duty, since the debtor can incur in an illegal behaviour that will trigger the application of the sanction. In view of the above, Kelsen defined the legal obligation in a negative sense as the omission of the unlawful behaviour by the subject whose conduct shapes such unlawful act, i.e., the offender or debtor.[31]

As to the Kelsenian concept of responsibility, it appears closely linked to the concept of legal duty for it indicates the ascription of legal effects, that is, the sanction or

[27] H. Kelsen, [1960] 1989 at 68.
[28] H. Kelsen, [1979] 1994 at 305.
[29] H. Kelsen, [1960] 1989 at 37.
[30] Ibid. at 111 and 256.
[31] Ibid. at 120.

execution, to the subject who has committed the unlawful deed, being possible to distinguish different levels of responsibility, whether wilful or negligent. In the second edition of *Pure Theory*, Kelsen distinguished between the concepts of legal duty as connected to the offense, and responsibility related to the sanction. This way, only those subjects who are obliged can avoid or trigger the imposition of the sanction through their behaviour, unlike those others who are just liable for the damages caused by a third party, because the behaviour of these latter does not determine the imposition or exclusion of the sanction.[32]

II. ON HOW LEGAL DUTIES OF MEDICAL PROFESSIONALS DETERMINE PATIENTS' RIGHT TO INFORMED CONSENT

Informed consent to medical intervention has been defined as a prerogative pertaining to patients' decisional autonomy that comprises the freedom to decide without violence, duress or manipulation about an intervention affecting their health. Specifically, informed consent is outlined by three main requisites—namely, information, freedom and capacity. Besides, its habitual legal formulation displays a complex structure divided in two phases or stages—informational and decisional—from which a set of subjective legal positions arise, viz., two duties of medical professionals, correlative to two subsequent subjective (reflex) rights of patients, respectively:[33]

1.- The first, informational stage appears depicted by medical professionals' duty to provide patients with available and adequate information about their health status, available medical intervention(s) and extant alternatives (including non-intervention), correlative to patients' right to receive the aforementioned medical information.

2.- The second, decisional stage, for its part, is demarcated by medical professionals' duty to ask patients for their previous informed authorisation (consent) and refrain from intervening in case of refusal, that which correlates to patients' right to freely decide whether to consent or refuse to the proposed medical intervention.

A Kelsenian-inspired stance that prioritises duties over rights permits to define patients' informed consent from medical professionals' duties. The adoption of such position facilitates an appropriate distinction of genuine subjective rights, unavoidably in need of correlative duties of the counterparty, from trivial desires devoid of legal status. From this approach, the presence of secondary norms (norms of conduct) ruling how medical professionals ought to behave with regards to informed consent merely confirms the existence of reflex rights of patients. Yet more importantly is that Western liberal legal orders also typically incorporate norms of competence whereby the imposition of certain sanctions is made dependent upon concrete subjects' will to bring legal action. The infringement by medical professionals of those duties that correlate to patients' reflex rights to informed consent illustrate the above, for it is common to find legal norms

[32] Ibid. at 119.

[33] N. Martínez–Doallo, The Conceptual Legal Structure of The Patient's Right to Informed Consent, *European Journal of Health Law* 30(1), 2023: 34–5.

establishing the responsibility of medical professionals for the inobservance of their duties on informed consent, while instituting patients' rights in the technical sense.

Thence, those norms prescribing the conducts that medical professionals ought to follow in the development of their professional activity are (secondary) norms of conduct for they establish certain deeds as owed, whose contravention leads to the consequence envisaged in the corresponding primary norm. As already stated, in Kelsen's opinion the establishment of duties constitutes the primary way in which law subjectivises. Secondarily, this phenomenon may also happen when the imposition of the sanction that is connected to the inobservance of such conduct depends on a subject's will to take legal action. In these cases, it is possible to assert the existence of a subjective right in the technical sense, which presupposes the presence of an empowering norm (norm of competence) enabling the subject to participate in the construction of the legal order.

Bearing in mind Kelsen's monist and positivist approach, patients' informed consent is to be primarily described from those norms establishing medical professionals' duties to disclose the medical information and ask for consent prior to the medical intervention, correlative to patients' reflex right to be recipients of these actions. These reflex rights, in turn, often appear linked to norms of competence empowering patients to enforce the content of aforesaid norms of conduct through the exercise of certain legal actions. Turning to Hohfeldian conceptions,[34] these norms create powers that allow recipients to make a change not just in their own legal position (from creditors to plaintiffs), but also in the counterparty's one (from debtor to defendant), being the latter liable to such change. Ultimately, the Kelsenian concept of legal personhood, understood as a hub of individual ascription, primarily settles on accountable medical professionals and just secondarily on patients, due to the preference of duties over rights in the framework of Kelsenian theory.

Certainly, the Kelsenian approach could be branded as excessively formalist and just presumably neutral. Not only Kelsen underestimated the role moral arguments play in the establishment and maintenance of legal norms and the social and political roots of law, but the Austrian Professor went further when he asserted that these elements are oblivious to law. Notwithstanding possible points of disagreement, an explanation based on duties as the one proposed by Kelsen presents the estimable advantage of affording an accurate delimitation of those legal positions deserving to be labelled as genuine subjective legal rights, which facilitates their distinction from mere wishes or aspirations lacking of sufficient legal basis, albeit the accomplishment of this task unavoidably requires the consideration of substantive grounds and argumentative criteria.

[34] W.N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning I, *Yale Law Journal* 23(1), 1913: 30.