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CHAPTER 8

Hans Kelsen and Southwest German Neo-Kantianism on Natural Law: Transcendental Philosophy beyond Metaphysics and Positivism

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Abstract

This chapter argues that Kelsen's discussion and conception of the foundations of law misunderstands essential aspects of the foundations of normativity. Kelsen seems to miss the point of Kant's transcendental turn in conceiving philosophical foundations, so important for the development of the philosophy after Kant, not least for the neo-Kantians. The main schools of neo-Kantianism have their central, common feature in stressing and rejuvenating exactly Kant's transcendental turn. This emphasis on the transcendental turn is prevalent in much of the Southwest neo-Kantian remarks on natural law. Kelsen, however, repeatedly presents Kant as a metaphysical thinker. This distinguishes Kelsen from the leading schools of neo-Kantianism, who consider Kant a post-metaphysical philosopher. The influence of neo-Kantianism, especially that of the Southwest School, on Kelsen should be seen, therefore, in an instrumental rather programmatic sense. Accordingly, the chapter will apply essentials of Kantian and neo-Kantian philosophy to Kelsen's analysis of law. From this, it will be argued that the hypothesis of law which underlies Kelsen's legal positivism is an inadequate expression of the idea of law.

> **What is Right?** This question may be said to be about as embarrassing to the jurist as the well-known question, "What is Truth?" is to the logician. It is all the more so, if, on reflection, he strives to avoid tautology in his reply, and recognizes the fact that a reference to what holds true merely of the laws of some one country at a particular time, is not a solution of the general problem thus proposed. It is quite easy to state what may be right in particular cases (*quid sit iuris*), as being what the laws of a certain place and of a certain time say or may have said; but it is much more difficult to determine whether what they have enacted is right in itself, and to lay down a universal criterion by which right and wrong

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> (*iustum et iniustum*) may be recognized. All this may remain entirely hidden from the jurist until he abandons his empirical principles for a time, and searches in pure reason for the sources of such judgments, in order to lay a real foundation for actual positive legislation. In this search his empirical laws may, indeed, furnish him with excellent guidance; but a merely empirical doctrine of right is, like the wooden head in the fable of Phædrus, that may be beautiful but unfortunately has no brain.[1]
>
> IMMANUEL KANT

Remarks on natural law are rather scarce in Southwest neo-Kantianism. They mostly appear in the context of remarks concerning metaphysics as an opposite standpoint to transcendental philosophy. For the neo-Kantians, transcendental philosophy is programmatically inaugurated by Kant. For Kelsen, however, Kant's philosophy is itself metaphysics, hence, Kant's philosophy of law is a part of the tradition of natural law theory.[2] Against this tradition, Kelsen develops his pure theory of law as a theory of the validity of positive law. This theory is supposed to be a sublimated form of *positivism* – and therefore a position which Kant and the neo-Kantians reject in principle. What is going on here, as Kelsen claims to integrate important aspects of transcendental philosophy? How should we understand the rejection of Kelsen's option by transcendental philosophy?

Indeed, it is my thesis that Kelsen's discussion and conception of the foundations of law misunderstands essential aspects of the foundations of

1 Immanuel Kant, *Kants gesammelte Schriften I–XXVI*, ed. Königlich-Preußische Akademie der Wissenschaften (Berlin: de Gruyter, 1910 ff.), vol. VI, 229 f. – Concerning the question "What is truth?"; cf. *ibid.,* vol. V, KrV, B 82, and Christian Krijnen, "Vom Abbild zum Begriff: Wahrheit als Übereinstimmung des Denkens mit sich," in *Bild, Abbild und Wahrheit: Von der Gegenwart des Neukantianismus*, ed. Tomasz Kubalica, (Würzburg: Königshausen & Neumann, 2013), 41–58 for a discussion of the matter also in relation to neo-Kantianism.

2 For this study, I particularly relied on Kelsen's essays concerning natural law and positivism (the main line of thought and important elements are, however, also contained in his *Reine Rechtslehre*). As far as my subject is concerned, it seems that any stylistic prudency present in Kelsen's earlier texts concerning the Kantian tradition is fully given up in the later ones, which confirms the thesis defended in my essay. In his early "Die Rechtswissenschaft als Norm- oder Kulturwissenschaft (1916)," in *Die Wiener rechtstheoretische Schule: Schriften von Hans Kelsen, Adolf Merkl und Alfred Verdross*, ed. Hans Klecatsky, René Marcic and Herbert Schambeck (Vienna [et al.]: Europa, 1968), 37–93, however, it becomes very obvious that Kelsen repudiates the essential elements of Southwest neo-Kantianism. The view that, in his early work, Kelsen was much more orientated by neo-Kantianism, while, in the later work, primarily by that of positivism, as, propounded, for example, by Wolfgang Schild, *Die reinen Rechtslehren*, (Vienna: Manz, 1975), 9ff., rests upon the neglect of significant programmatic differences, as will become clear in the present text.

normativity. Kelsen seems to simply miss the point of Kant's transcendental turn in conceiving philosophical foundations, so important for the development of the philosophy after Kant, not least for the neo-Kantians. The main schools of neo-Kantianism have their core common feature in stressing and rejuvenating Kant's transcendental turn. It is exactly this emphasis on the transcendental turn, which is prevalent in much of the Southwest neo-Kantian remarks on natural law too. Therefore, it is of no surprise that Kelsen time and again presents Kant as a metaphysical thinker. Already this very important matter distinguishes him from the leading schools of neo-Kantianism. For these variants of neo-Kantianism, Kant is a post-metaphysical philosopher, if not the most radical post-metaphysical thinker, as Heinrich Rickert states: the "philosopher of modern culture,"[3] or, to speak in terms of Cassirer's essay on natural law and its distinction between pre-modern and modern natural law theory: Modern natural law theory adheres to the "Platonic Thesis" that there is a law "beyond" the "sphere of mere power and will," having its foundation in "pure reason" as the "original statutory" (*ursprünglich-setzende*) factor.[4]

Hence, influences of neo-Kantianism, especially those of the Southwest School, on Kelsen should primarily be taken in an instrumental sense, not in a programmatic sense. Consequently, the discussion between Kelsen and neo-Kantianism should also take the shape of a discussion between different types of philosophy: of an internal philosophical debate. At least it will in the following deliberations. That Kelsen conceives of his *Reine Rechtslehre* through "analogy with Kant's theory of knowledge" as a "transcendental-logical justification of the validity of positive law"[5] is nothing but a malapropism.

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3 Cf. Heinrich Rickert, *Kant als Philosoph der modernen Kultur: Ein geschichtsphilosophischer Versuch,* (Tübingen: Mohr Siebeck, 1924). All translations from German texts are mine.

4 Ernst Cassirer, "Vom Wesen und Werden des Naturrechts," *Zeitschrift für Rechtsphilosophie in Lehre und Praxis* 6 (1932), 8. Cassirer makes an argument for the modern idea of natural law, i.e., a transcendental conception of the foundations of law against, among others, positivism. For him, one should not simply engage in a cursory examination of natural law, as the "self-confidence" and "self-satisfaction," characterizing "positivism of the nineteenth century," has been forfeited (*ibid.,* 21). Cassirer also emphasizes that, in the seventeenth and eighteenth century, the doctrine of natural law was of highly practical relevance, not an "unworldly speculation" (*ibid.,* 19), and not a doctrine propounding a (then, of course, superfluous) "double-world conception" of natural and positive law (as, we can add, suggested by Kelsen). In conformity with the idea of rational foundations which typify transcendental philosophy, for Cassirer, law is not some type of "contingent" creation, originating from the animal nature of men, but it is "constitutive for humans, a necessary precondition of the '*humanitas ipsa*'" (*ibid.,* 23). Positive law, then, does not satisfy the inescapable urge for "unwritten laws" (*ibid.,* 27).

5 Hans Kelsen, "Vom Geltungsgrund des Rechts (1960)," in *Die Wiener rechtstheoretische Schule,* 1417–27, 1427. Cf. Hans Kelsen, "Die philosophischen Grundlagen der Naturrechtslehre und

In contrast to this self-understanding of Kelsen's, Kant scholars have rightly conceived of Kelsen as a non-Kantian positivist – though as a positivist in a consequent and sublimated form – and with his philosophical position as one that fails to conceptualize the foundations of law adequately.[6] These foundations do not only concern the process of law-making and with that the positive validity of law – i.e., Kelsen's focus – but also the validity of a positive system of law itself and the law-making process it results from. The latter concerns the Kantian *questio iuris* and thereby a dimension that cannot be treated by referring to positive law-making. Positive law-making *presupposes* such a non-positive concept of law, enabling positive law: it presupposes the issue of an *a priori* approach to law, an issue at stake in the natural law tradition (taken in the broad sense). Kelsen's basic norm (*Grundnorm*) only concerns a formal dimension of law-making, excluding the content of its result, hence, essentially differing from Kant's project of transcendental foundations. Transcendental foundations concern, non-naturalistically, the conditions positive law-making has to fulfil formally and materially in order to be true law, and not merely the formally correct establishment of injustice through positive law. Law founded on Kelsen's basic norm does, expressly, not guarantee this. Indeed, it is an essential feature of legal positivism that it refrains from material criteria for positive

des Rechtspositivismus (1928)," in *Die Wiener rechtstheoretische Schule*, 281–350, 339, and Hans Kelsen, *Reine Rechtslehre*, 2. vollst. neu bearb. und erw. Aufl. (Wien: Deuticke, 1960), 208 note, cf. 204 f.

6 See, for example: Hariolf Oberer, "Praxisgeltung und Rechtsgeltung," in *Lehrstücke der praktischen Philosophie und der Ästhetik*, ed. Gerd Wolandt and Karl Bärthlein, (Basel/Stuttgart: Schwabe, 1977), 87–111; Otfried Höffe, "Naturrecht ohne naturalistischen Fehlschluß: ein rechtsethisches Programm," in *Den Staat braucht selbst ein Volk von Teufeln*, (Stuttgart: Reclam, 1988), 24–55; Otfried Höffe, *Politische Gerechtigkeit: Grundlegung einer kritischen Philosophie von Recht und Staat*, (Frankfurt am Main: Suhrkamp, 1987), 118 ff; Otfried Höffe, *Kategorische Rechtsprinzipien*, (Frankfurt am Main: Suhrkamp, 1995), 63 ff. Both Oberer and Höffe also refer to the neo-Kantian background of Kelsen's approach. Unfortunately, however, this reference to neo-Kantianism only concerns Hermann Cohen's often criticized "theoretical" interpretation and appropriation of Kant's practical philosophy, leading to a philosophy of law as a "logic" of law. This is not the path guiding the 'practical' philosophy of the Southwest neo-Kantians; they follow a different approach. The extent of the lack of knowledge of neo-Kantian philosophy, by contemporary German Kant scholars, which less than a century ago dominated philosophy, in particular, German philosophy, becomes evident when Höffe, ("Der kategorische Rechtsimperativ," in *Immanuel Kant, Metaphysische Anfangsgründe der Rechtslehre*, ed. Otfried Höffe, (Akademie Verlag, 1999), 41–62, 46), without any hesitation, qualifies Kelsen as a "neo-Kantian." At least in this respect, Gustav Boehmer, *Grundlagen der bürgerlichen Rechtsordnung: Zweites Buch. Erste Abteilung: Dogmengeschichtliche Grundlagen*, (Tübingen: Mohr Siebeck, 1952), 143, is correct, designating (in his otherwise rather uneven work on the *Foundations of the Civil Legal Order*) the Vienna School of Law as "Vienna School of neo-Kantianism" in the sense of a "deformed variation" (*Abart*) of neo-Kantianism.

law-making, whereas Kant and, as we will see, Southwest neo-Kantianism are concerned exactly with such trans-positivist material criteria. According to Gustav Radbruch, a thinker thought to be part of the neo-Kantian philosophical movement, it belongs to the concept of correct law (*richtiges Recht*) to be both positive and materially correct,[7] hence, making an anti-Kelsenian and a pro-transcendental statement. Apparently, the anti-naturalistic stance of Kelsen, leading him to a determinate, though positivist, concept of normativity that is certainly inspired by neo-Kantianism, can in no way bridge the indicated immense programmatic gap concerning the foundations of normativity.

One of the basic ideas of neo-Kantianism, especially of its Southwest School (Wilhelm Windelband, Heinrich Rickert, Emil Lask, Bruno Bauch, Jonas Cohn, *et al.*), is that philosophy is philosophy of values, i.e., of determining factors of human orientation. As a comprehensive philosophy of values, philosophy turns out to be a philosophy of culture; philosophy determines the foundations of culture. This conception of philosophy stems from a Fichte-inspired creative interpretation and appropriation of Kant's transcendental philosophy, rejuvenating his Copernican turn in order to deal with problems the neo-Kantians were facing in their time.

In order to comprehend the concept of natural law and its transcendental transformation, I will first sketch the essential elements of the neo-Kantian idea that philosophy is a foundational theory of culture and, as such, a philosophy of values and their validity. From this it will become clear, in section 1, the manner in which we are dealing with a post-metaphysical and non-positivistic philosophy.[8] This sketch provides relevant background

7 Gustav Radbruch, *Rechtsphilosophie*, 8th ed., eds. Erik Wolf and Hans-Peter Schneider, (Stuttgart: Koehler, 1973), 169.

8 This overview is orientated differently from that of Paulson in his recent "general characterization of neo-Kantianism" (cf. Stanley L. Paulson, "Hans Kelsen und Gustav Radbruch: Neukantianische Strömungen in der Rechtsphilosophie," in *Marburg versus Südwestdeutschland: Philosophische Differenzen zwischen den beiden Hauptschulen des Neukantianismus*, eds. Christian Krijnen and Andrzej Noras, (Würzburg: Königshausen & Neumann, 2012), 141–162, 141–145). Paulson, of course, has addressed Kelsen's relationship to Marburg and South-West neo-Kantianism in many respects. His aim is not so much to defend as to understand Kelsen. In addition, see, Stanley L. Paulson, "Konstruktivismus, Methodendualismus und Zurechnung im Frühwerk Hans Kelsens," *Archiv des öffentlichen Rechts* 124, no. 4 (1999) 631–657; "Der fin de siècle Neukantianismus und die deutschsprachige Rechtsphilosophie," in *Neukantianismus und Rechtsphilosophie*, ed. Robert Alexy et al. (Baden-Baden: Nomos, 2002), 11–21; "Faktum/Wert-Distinktion, Zwei-Welten-Lehre und immanenter Sinn: Hans Kelsen als Neukantianer," in *Neukantianismus und Rechtsphilosophie*, 223–251; "Der Normativismus Hans Kelsens," *Juristenzeitung* 61 (2006) 529–536; "Konstitutive und methodologische Formen: Zur Kantischen und neukantischen Folie der Rechtslehre Hans Kelsens," in *Kant im Neukantianismus: Fortschritt oder Rückschritt?*, eds. Marion Heinz and Christian Krijnen, (Würzburg:

information. However, it is without direct reference to Kelsen. In contrast, section 2 will apply results from Part one to Kelsen's analysis of law: I will discuss the concept of natural law and its transcendental transformation in the philosophy of leading figures of the Southwest School,[9] taking Kelsen's analysis of law, especially of natural law into account. This leads to insights into Kelsen's philosophical relationship with the Southwest School of neo-Kantianism, a relationship much more extrinsic than Kelsen's terminology of "being" versus "ought," "reality" versus "values" or "norms" and the like would suggest. From the perspective of the Southwest School of neo-Kantianism, Kelsen is not a neo-Kantian, but a dogmatic philosopher of law, who fails to address the question of the foundations of law in an *objective* sense: Kelsen's reference to a first historical law and his focus on generating methodologically correct laws proceeding on that basis presupposes the objective criterion of law. This objective criterion is at stake in a Kantian and neo-Kantian determination of law; it concerns law in its objective validity, i.e., the famous and far-reaching Kantian and neo-Kantian *questio iuris,* which in this case is about the cultural phenomenon of law. From his own perspective, of course, Kelsen

Königshausen und Neumann, 2007), 149–165. For a discussion of Paulson's work, focusing on Rickert, see Christian Krijnen, "The Juridico-Political in South-West neo-Kantianism: Methodological Reflections on its Construction" in *The Foundation of the Juridico-Political: Concept Formation in Hans Kelsen and Max Weber*, eds. Ian Bryan, Peter Langford and John McGarry, (Abingdon: Routledge, 2016) 61–76.

9 For a discussion of Kelsen and the Marburg School of neo-Kantianism, see the previously mentioned texts of Paulson as well as: Geert Edel, "The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen," in *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, eds. Stanley L. Paulson and Bonnie L. Paulson, (Oxford/New York: Clarendon Press; Oxford University Press, 1998), 195–219; Helmut Holzhey, "Die Transformation neukantianischer Theoreme in die Reine Rechtslehre Kelsens," in *Hermeneutik und Strukturtheorie des Rechts*, eds. Michael W. Fischer, Erhard Mock and Helmut Schreiner, (Wiesbaden: Steiner, 1984), 99–110; Holzhey, "Kelsens Rechts- und Staatslehre in ihrem Verhältnis zum Neukantianismus," in *Untersuchungen zur Reinen Rechtslehre*, eds. Stanley L. Paulson, Robert Walter and Stefan Hammer, (Wien: Manz, 1986), 167–192; Holzhey, "Rechtserfahrung oder Rechtswissenschaft – eine fragwürdige Alternative. Zu Sanders Streit mit Kelsen," in *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker,* eds. Ota Weinberger and Werner Krawietz, (Vienna/New York: Springer, 1988), 47–75. Aspects of Kelsen's conception such as shaping the philosophy of law as a logic of the science of law or holding that foundations are subject to changes, partly fit in with the Marburg School but do not, for the most part, fit with the Southwest School. In recent years, the influence of South-West neo-Kantianism on the philosophy of law in the early twentieth century has been addressed in the PhD studies of Sascha Ziemann, *Neukantianisches Strafrechtsdenken: Die Philosophie des Südwestdeutschen Neukantianismus und ihre Rezeption in der Strafrechtswissenschaft des frühen 20. Jahrhunderts*, (Baden-Baden: Nomos, 2009) and Friederike Wapler, *Werte und das Recht: Individualistische und kollektivistische Deutungen des Wertbegriffs im Neukantianismus*, (Baden-Baden: Nomos, 2008). Both authors correctly identify that Kelsen was influenced by the Marburg and the South-West school, but was not a typical representative either one of them.

transcends positivism proper as, for Kelsen, law conceptually rests on the foundational norm (*Grundnorm*) as the ultimate "hypothesis" of law. According to the standards of transcendental philosophy, however, this hypothesis turns out to be an inadequate expression of the idea of law, i.e., the foundation of law.

1 Philosophy as Philosophy of Culture and Values

1.1 *The Problem of Foundations and Validity*

In order to grasp neo-Kantianism as a philosophical movement, it is important to see that neo-Kantianism primarily understands philosophy as a science of foundations. As such, neo-Kantianism underscores the basic intention of metaphysics to address fundamental questions concerning our understanding of the world and ourselves.[10]

From a historical point of view, Plato is important here for the neo-Kantians:[11] Plato showed that we can only understand the foundations of both things and our knowledge of them if we assume ideas that transcend sensible experience. The neo-Kantians thus agreed with Plato that philosophy should be idealism. However, although Plato tried to understand ideas as principles for all that is, his classical metaphysical position insufficiently differentiates between being and knowledge, ontology and logic. He understands ideas as themselves a type of being, i.e., a general, transcendent, non-sensible and proper being.

Kant's project of transcendental philosophy brought to an end such a reification of ideas. The domain of philosophical foundations, "the transcendental" so to speak, is discovered to be a domain of principles that are the ground for the validity of thought and action as such. These principles should not be understood as a type of *being,* but rather as a whole of principles of *validity.* That is, they must be seen as conditions that first enable and direct our thought and action. Thus, principles are to be conceived of as preceding experience without losing their intimate relation to experience. Put in more general terms, any putative ontology presupposes a transcendental logic.[12]

10 For a more extensive consideration, see Christian Krijnen, *Nachmetaphysischer Sinn: Eine problemgeschichtliche und systematische Studie zu den Prinzipien der Wertphilosophie Heinrich Rickerts* (Würzburg: Königshausen & Neumann, 2001), Chapters 1–3.

11 Cf. on Plato and neo-Kantianism e.g. Helmut Holzhey, "Platon im Neukantianismus: Einleitung und Überblick," in *Platon in der abendländischen Geistesgeschichte: Neue Forschungen zum Platonismus*, eds. Theo Kobusch and Burkhard Mojsisch, (Darmstadt: Wiss. Buchges., 1997), 227–240, and Karl-Heinz Lembeck, *Platon in Marburg: Platon-Rezeption und Philosophiegeschichtsphilosophie bei Cohen und Natorp*, (Würzburg: Königshausen & Neumann, 1994).

12 Cf. on Kant and neo-Kantianism: Heinz and Krijnen, *Kant im Neukantianismus*.

For Kant, knowledge has its ground in the cognitive relation which is defined in terms of the *a priori* conditions that make knowledge and the objects of knowledge first possible. The objective validity of these conditions lies in their function to enable possible experience, not in their relation to a supersensible world.

1.2 *The Spiritual Background*

This systematic link to the history of philosophy is only one aspect of neo-Kantianism. Another aspect concerns the fact that a philosopher never operates in a cultural vacuum, but is also always imbued with the spirit of his own age. Neo-Kantianism also reacts to its cultural context and must be understood from this perspective. The cultural or spiritual context of neo-Kantianism is a complex one. I will highlight one important line of influence.

This line starts with Hegel's death as a historical date that has symbolic meaning for the history of philosophy: German Idealism had lost its leading spiritual position in Germany. Henceforth, natural science, a more historical orientation, realism, the general "loss of illusions" gradually came to dominate intellectual culture. This provoked a kind of post-idealistic identity crisis.[13]

With Hegel's death his philosophy and the Hegelian conception of the unity of facticity and meaning, of reason and reality, had also faded. As a result, not only the influential theme of "worldview" (*Weltanschauung*), suggesting a situated perspective on totality, could spring up and grow popular, but also all kinds of naturalism and scientific reductionism, evoking loss of meaning, of the richness and depth of life, sprouted. The ghost of nihilism, of a metaphysical void dawned.

This spiritual background points already to neo-Kantianism: Neo-Kantianism tries to overcome the above-sketched post-idealistic gap between "is" and "ought." The situation becomes even more complex, as the empirical sciences appeared to be emancipated from philosophy and became wholly independent. Hence, the question arose: what is the purpose of philosophy?

1.3 *Neo-Kantianism as Epistemology*

By the middle of the nineteenth century, marking out and making sense of the field of distinctively philosophical investigations had become problematic.[14]

13 Cf. the analysis of Herbert Schnädelbach, *Philosophie in Deutschland 1831–1933*, (Frankfurt am Main: Suhrkamp, 1983).

14 Cf. for the neo-Kantian view on this, for example, Heinrich Rickert, *System der Philosophie: Erster Teil: Allgemeine Grundlegung der Philosophie*, (Tübingen: Mohr Siebeck, 1921), Chap. 1; Ernst Cassirer, *Das Erkenntnisproblem in der Philosophie und Wissenschaft der neueren Zeit. Teil 4*, Nachdr. d. 2. (Darmstadt: Wiss. Buchges., 1994), 19–26; or the

This problem leads us directly to the beginning of neo-Kantianism. In reaction to the identity crisis of philosophy, neo-Kantianism, both in its early and its mature forms, makes a case for the rehabilitation of philosophy.

This rehabilitation starts with a clear commitment to epistemology (*Erkenntnistheorie*) as the ultimate foundational discipline of both philosophy and the other sciences.[15] To be sure, this does not at all imply a reduction of philosophy to epistemology. Neo-Kantian philosophy is about culture in the broad sense, not just about knowledge and science in the narrow sense. With respect to the rehabilitation of philosophy, the neo-Kantians, as the epithet suggests, return to Kant.

Of course, many regard neo-Kantianism as primarily an epistemological Kantian movement. There are plenty of reasons for doing so. Widespread topical and methodological uncertainty in the universities led philosophers, such as Eduard Zeller, and scientists, like Hermann von Helmholtz, to attempt to provide philosophy with its own topic and its own method, while at the same time discussing the methods and principles of the non-philosophical sciences, which were developing ever so rapidly in their time. Such attempts led to what at the end of the 1870s became known as the Marburg and Southwest Schools of neo-Kantianism. Fairly soon these schools came to dominate the epistemological debates of the nineteenth century. It is therefore not entirely untrue to see neo-Kantianism as primarily an epistemological movement.

However, more recent research on neo-Kantianism suggests that this view is responsible for much confusion about neo-Kantianism. In particular, the cultural-philosophical nature of neo-Kantianism as a reaction to a crisis has, as a result, been insufficiently acknowledged. At present, it is emphasized that questions regarding worldviews were in fact the primary orientation behind the "logical" preoccupations of the neo-Kantians.[16] Despite the many differences in neo-Kantian theories,[17] it is a modern philosophy of culture that

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subsequent views of Alwin Diemer, ed., *Beiträge zur Entwicklung der Wissenschaftstheorie im neunzehnten Jahrhundert*, (Meisenheim am Glan: Hain, 1968) and Schnädelbach, *Philosophie in Deutschland*, 88, 118.

15 In this respect, Eduard Zeller's "On the meaning and the task of epistemology" (Eduard Zeller, "Über Bedeutung und Aufgabe der Erkenntnistheorie (1862)," in *Vorträge und Abhandlungen II* (Leipzig: Fues, 1877), 479–496) has become one of the famous founding texts.

16 Cf., for example, the initial contributions of Homann, Orth, Malter, Tenbruck in Helmut Holzhey and Ernst W. Orth, eds., *Neukantianismus: Perspektiven und Probleme*, (Würzburg: Königshausen & Neumann, 1994), to which a larger body of work has subsequently been added.

17 Cf. on differences between the Marburg School and the South West School: Krijnen and Noras, *Marburg versus Südwestdeutschland.*

unites the Marburg and Southwest neo-Kantians. The interpretation of Kant's philosophy is equally part of this goal.

1.4 *Philosophy as Worldview* (*Weltanschauung*)

The concept of "worldview" serves as an abbreviation for the problem of the *validity of values* and, hence, points to the dispute about how culture is to be shaped. Nihilism, the loss of faith in the rationality of the world and the values assumed to be valid, is not only a major challenge to neo-Kantianism, but also a concern of many other scientists and thinkers towards the end of the nineteenth century, for example Bergson, Sorel, Durkheim, Dilthey, Weber, Simmel, Michels, Mosca, Pareto.

To understand neo-Kantianism properly, however, it is important that the emphasis on the cultural-philosophical aspect does not lead one to disregard the specific way in which the neo-Kantians put culture on the philosophical agenda. Not just *that* neo-Kantianism can be understood as a philosophy of culture and that it understands itself as such, but also *how* it is to be seen as a philosophy of culture is what makes up the peculiar nature, unity, the relation to Kant and the argumentative potential of neo-Kantianism.

1.5 *"Back to Kant"*

The labels "neo-Kantianism" or "Critical philosophy" (*Kritizismus*) are best restricted to the Marburg School – whose main representatives are Hermann Cohen, Paul Natorp and Ernst Cassirer – and the Southwest German School, also called the Baden School or Heidelberg School – whose protagonists were, in particular, Windelband, Rickert, Lask and Bauch. Both schools are formed at the end of the 1870s. They represent the mature theories of neo-Kantian philosophy.[18]

The famous dictum "back to Kant," originating with Otto Liebmann,[19] one of the pathfinders for neo-Kantianism, encapsulates in a concise and programmatic way the determined recourse to Kant of the leading neo-Kantians.

18 Of course, broader conceptions of neo-Kantianism exist. Some identify as many as seven sub-schools. Recently a discussion has arisen concerning the question of whether the division of neo-Kantianism proper should consist of three schools: the mentioned two and a type of neo-Kantianism called "realist critical philosophy" (*realistischer Kritizismus*). The latter includes philosophers like Alois Riehl, Otto Liebmann, Richard Hönigswald and Bruno Bauch. See on this subject, the dispute between Krijnen and Zeidler in Christian Krijnen and Kurt W. Zeidler, eds., *Wissenschaftsphilosophie im Neukantianismus*, (Würzburg: Königshausen & Neumann, 2014).

19 In his book *Kant und die Epigonen: Eine kritische Abhandlung* (1865) ed. Bruno Bauch, (Berlin: Reuther & Reichard, 1912) in which he compared the German idealists, Herbart, Fries and Schopenhauer with the Critical philosophy of whose "absoluteness" and

However, Kantian motives can be found not only in neo-Kantianism, but in almost every philosophical school of thought in the nineteenth and twentieth century (at least in the continental tradition).[20] Therefore, an additional feature marking out neo-Kantianism is needed. Windelband formulated a dictum not less famous than that of Liebmann: "To understand Kant rightly means to go beyond him."[21] For the leading figures of neo-Kantianism this dictum means that the return to Kant is not a mere reproduction of his historical position; to understand Kant means to further the development of philosophy with the help of Kant.

However, not even the tendency to advance philosophy by Kantian means is specific to neo-Kantianism. Already German idealists such as Fichte and Hegel were committed to this goal. Again, an additional feature is needed to determine the specific nature of neo-Kantianism.

1.6 *The Problem of Validity*

At the centre of the efforts of the neo-Kantians, as indicated earlier, is the problem of validity (*Geltung, Gültigkeit*). Taking the validity of our theoretical and non-theoretical – practical, aesthetic, religious – endeavours as its theme constitutes the core of neo-Kantian philosophy. For neo-Kantianism, philosophy *is* the theory of validity, as insinuated in the above remarks on Plato and Kant.

In developing a theory of validity, the neo-Kantians not only follow Plato's conviction that philosophy can only succeed as idealism, but at the same time emphasize a fundamental aspect of Kant's critical philosophy, namely, that the determinacy of human endeavours, being products of reason, is to be established by means of a determination of the *principles* of their *validity.*

Neo-Kantians, thus, especially appreciate Kant's insight into the problem of validity (cf. paradigmatically the *quid iuris* issue in Kant's Transcendental Deduction of the categories).[22] At the same time, they find it important to

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"certainty" (*ibid*, 13) he was convinced, Liebmann wrote at the end of each chapter: "Hence, we must return to Kant."

20 For example, in post-Kantian German Idealism, in the work of Fries, Herbart, Lotze, Laas, Avenarius, Mach, Dilthey, Jaspers, Heidegger, the Frankfurt School, the transcendental pragmatics of Apel, and even in postmodern philosophers like Lyotard and Foucault.

21 Cf. Wilhelm Windelband, *Präludien: Aufsätze und Reden zur Philosophie und ihrer Geschichte*, 5th ed., 2 vols. (Tübingen: Mohr Siebeck, 1915), Vol. I, IV. On the occasion of the hundredth anniversary of Kant's death, Windelband posed the question "how to understand Kant correctly in order to go beyond him?" (Windelband, "Nach hundert Jahren (1904)," in *Präludien* I, 147–167, 148).

22 The terminology used is, in this respect, only of secondary relevance. Terms like validity (*Geltung, Gültigkeit*), value (*Wert*), meaning (*Sinn, Bedeutung, Gehalt*), justification

develop further Kant's concept of philosophy, rather than resort to metaphysical speculation as did, according to their opinion, the German idealists or regard the method of philosophy in terms of a positivistic approach to the nature of validity. Neo-Kantians therefore do not only reactivate Kant's contribution to philosophy; their aim is to renew it in the light of a different constellation of philosophical problems from Kant's.

Against post-Kantian German Idealism, neo-Kantians stress that philosophy should not study things *qua* their being, but focus on the validity of thinking things *qua* their being.[23] In some respects one could see Hegel's logic as a development of Kant's transcendental logic. On this reading, Hegel's analysis of the determinations of thought leads to a fundamental set of *a priori* conditions. For the neo-Kantians, however, Hegel's logical system is not just a totality of logical conditions for the validity of thought; they reproach him for having conceptualized thought as itself a metaphysical reality of spirit. In their view, Hegel contaminates the radical foundations of modernity with classical metaphysics, hence departing from the framework of Kantian transcendental philosophy.[24]

Anxious not to take the conditions of validity of thought of reality again as itself a reality, the neo-Kantians discriminate sharply between validity and being. Hence, they try to correct the assumed metaphysical position of Hegel by harking back to Kant's critical arguments. According to the neo-Kantians, validity and being are related to each other in such a way that, following Kant, being has its foundation in validity, and, thus, ontology in epistemology. According to their understanding of Kant's transcendental philosophical

(*Rechtfertigung*), foundation (*Grundlage, Grundlegung, Begründung*) specify the general problem of validity.

23 Cf., for example, the famous statements of Hermann Cohen, *Kants Begründung der Ethik: Nebst ihren Anwendungen auf Recht, Religion und Geschichte*, 2nd ed., (Berlin: Cassirer, 1910), 27 f. and Ernst Cassirer, *Das Erkenntnisproblem in der Philosophie und Wissenschaft der neueren Zeit. Teil 2*, Nachdr. d. 3., (Darmstadt: Wiss. Buchges., 1994), 662.

24 Cf. on Hegel and neo-Kantianism, recently, Christian Krijnen, *Philosophie als System: Prinzipientheoretische Untersuchungen zum Systemgedanken bei Hegel, im Neukantianismus und in der Gegenwartsphilosophie*, (Würzburg: Königshausen & Neumann, 2008); and from the older literature: Werner Flach, *Negation und Andersheit: Ein Beitrag zur Problematik der Letztimplikation*, (München; Basel: Schwabe, 1959); Helmut Holzhey, "Hegel im Neukantianismus: Maskerade und Diskurs," *il cannocchiale. rivista di studi filosofici*, 1/2 (1991) 9; Heinrich Levy, *Die Hegel-Renaissance in der deutschen Philosophie*, (Charlottenburg: Pan, 1927); Siegfried Marck, *Die Dialektik in der Philosophie der Gegenwart*, 2 vols, (Tübingen: Mohr Siebeck, 1929–31); Wolfgang Marx, *Transzendentale Logik als Wissenschaftstheorie: Systematisch-kritische Untersuchungen zur philosophischen Grundlegungsproblematik in Cohens 'Logik der reinen Erkenntnis'*, (Frankfurt am Main: Klostermann, 1977), 133 ff.

method, philosophy has as a point of departure the given, i.e., a concrete experience, or the fact (*Faktum*) of culture in order to establish its principles, as Kant would put it: the conditions of its possibility.

1.7 *Pure Subject versus Empirical Subject*

For the neo-Kantians, as presumed successors of Kant, philosophy does not take as its theme the world in terms of a direct relation to objects, as do the non-philosophical sciences. They do not assume the "I" or "consciousness" to be an empirical phenomenon, nor do they take the relation between such empirical phenomena and the world to be a philosophical topic. Rather, philosophy aims at determining the validity structure of experience. Time and again, neo-Kantians criticize all kinds of metaphysical, psychological, physiological and what nowadays is called (neo-)structuralist and evolutionary-biological conceptualizations of epistemology, or, more comprehensively, of the philosophy of culture.

Such attempts understand knowledge (and other human endeavours) as an ontic relationship. According to the neo-Kantians, these deficient conceptualizations, including their agnostic and relativistic implications, deprive epistemology of its fundamental theme: the validity of knowledge.

Neo-Kantians exclude the empirical subject and its anthropological and metaphysical connotations from study insofar as they primarily focus on a "pure subject." This subject, in the sense of the whole of the principles of validity (*a priori* structures, values, etc.), is understood as the foundation of all that can be valid and hence as the ground for the possibility of objectivity.

By means of this strategy, which discriminates sharply between, on the one hand, a "pure" subject as a foundation of objectivity and, on the other, an "empirical" subject which is grounded on that normative foundation, the neo-Kantians seek to overcome what they consider to be certain exaggerated positions or naïve, objectivist worldviews whether they are called, for example, naturalism, materialism, psychologism, empiricism, positivism, logicism, fideism, historicism, *Lebensphilosophie* or nihilism.

1.8 *Philosophy of Culture*

As in theoretical philosophy, the relation between the unconditional norm of the pure subject and its conditional fulfilment by the empirical subject has an equally central role in the philosophy of culture. This proportional relation of validity makes clear that the duality of facticity and meaning, of reason and reality, of "is" and "ought," elaborated on in the section on the "spiritual background," is grounded on premises that turn out to be false.

We may illustrate this through Heinrich Rickert's concept of "meaning." Meaning is conceptualized as the recognition by the finite rational being called "man" of unconditionally valid theoretic and non-theoretic values. The reciprocal relation of implication and the one-sided relation of foundation between the norm and that for which the norm is, absolute demand and finite fulfilment, principle and the concrete, entails of course that the human production of meaning is characterized by finitude.

Therefore, the neo-Kantians deny that the common duality of subject and object as between an empirical subject and an inner or outer world is fundamental to epistemology. They develop another kind of relationship that not only turns out to be more fundamental, but also proves to be of great importance to the development of a philosophy of culture.

Starting the philosophical analysis with given cultural phenomena, spheres of culture containing objective validity claims, does not imply that the premise of the analysis is a *Faktum* that is stipulated dogmatically as valid.[25] Rather, the analysis takes such "facta" as problematic, as a validity *claim* that is in need of philosophical determination and evaluation. According to the neo-Kantians' understanding of the method of transcendental philosophy, the original determinacy of the different spheres of culture is to be known via an oblique, validity-reflexive disclosure of the constituents of meaning of those spheres of culture, i.e., of the principles of validity of those claims.[26]

1.9 *The Primacy of "Ought"*

Like Kant, in order to provide a conceptual account of "the world of man," the neo-Kantians take their standpoint in culture in terms of a system of meaning. With this they aim to show reason itself to be the governing principle of our world, of culture.

Take the case of the Southwest School of neo-Kantianism. Unlike the Marburg School, the Southwest School does not fall victim to the "intellectualistically narrow"[27] focus of Cohen, who initially restricted philosophical

25 Cf. for the neo-Kantian doctrine of the *Faktum* Krijnen, *Philosophie als System*, 1.3.

26 Heinrich Rickert, *Wilhelm Windelband*, 2. erw. (Tübingen: Mohr Siebeck, 1929), 17, for example, holds that the conception of Wilhelm Windelband and that of the "school of Hermann Cohen and Natorp" are connected not only by the "reference to Kant" and the "rejection of a metaphysics of 'things in themselves,'" but also by the endeavour to develop a "comprehensive philosophy of culture, hence, not to restrict oneself to epistemology."

27 "*Intellektualistische Verengung*," Helmut Holzhey, "Die Marburger Schule des Neukantianismus," in *Erkenntnistheorie und Logik im Neukantianismus: Eine Textauswahl*, ed. Werner Flach and Helmut Holzhey, (Hildesheim: Gerstenberg, 1980), 15–33, 19.

analysis predominantly to the cultural fact of scientific knowledge, although, in a later phase, Natorp and Cassirer broadened the scope of philosophy. From the start, the Southwest School takes culture in its widest sense, striving for its philosophical comprehension.

The Southwest School conceives of culture as determined by values. From a philosophical point of view, what is called theoretical culture ("knowledge") has a logical and a systemic primacy. Already in theoretical philosophy, it turns out that theoretical culture rests on a system of theoretical values (*a priori* structures, principles), which determine the validity of theoretical endeavours.[28] The values that comprise the value "truth" ought to be normative for the thoughts of empirical subjects in order to assure that their thought truly is knowledge of objects, i.e., that thought is objective. This logical relation within the realm of theoretical culture is then transported to other spheres of culture: these too consist of subjects who acknowledge values.

In this sense the Southwest School neo-Kantians propagate the primacy of "ought" (*Sollen*), a primacy of practical reason in its most radical, and not just in its practical sense, namely, in the sense that it encompasses *all* dimensions of reason.[29] They propagate a philosophy of values as a philosophy of culture.

Numerous historical and systematic studies of the first decades of the twentieth century make clear that the Southwest School is to be seen as a comprehensive philosophy of values. But they also make clear that the concept of value is a fundamental concept: philosophy is essentially about values. The idea of living through a metaphysical crisis fits well with this systematic perception. After all, the exploration of values should contribute to the overcoming of the post-German-idealist divide between values and reality that threatened to make human orientation both practically impossible and

28 In contemporary philosophy such values are called *epistemic values,* cf., for instance, Adrian Haddock, Alan Millar and Duncan Pritchard, eds., *Epistemic value*, (Oxford/New York: Oxford University Press, 2009).

29 Cf. for the "primacy of practical reason" e.g. Heinrich Rickert, *Fichtes Atheismusstreit und die Kantische Philosophie*, (Berlin: Reuther & Reichard, 1899), 44; Rickert, "Zwei Wege der Erkenntnistheorie: Transcendentalpsychologie und Transcendentallogik," *Kant-Studien* 14 (1909), 215ff.; Rickert, *Der Gegenstand der Erkenntnis: Einführung in die Transzendentalphilosophie*, 6. verb. Aufl., (Tübingen: Mohr Siebeck, 1928), VII, 309 ff., 437; Wilhelm Windelband, "Kulturphilosophie und transzendentaler Idealismus (1910)," in *Präludien* II, 279–294, 287. Cf. on this doctrine Christian Krijnen, *Nachmetaphysischer Sinn*, 7.2.3.1. and Krijnen, "Anerkennung, Wirklichkeit und praktische Vernunft im Neukantianismus," in *Das Wirklichkeitsproblem in Metaphysik und Transzendentalphilosophie: Heinrich Barth im Kontext*, ed. Christian Graf, (Basel: Schwabe, 2014), 15–51.

theoretically incomprehensible. The philosophy of values acts against the culture of nihilism by showing that there are values that are objectively valid.

Hence, the concept of "value" – and closely related concepts like "meaning," "ought," "validity" – has a meaning that goes far beyond its *methodological* function in the constitution of the subject matters of arts and humanities. It points to the aforementioned *metaphysical* dimension that contains the grounds of our thoughts and action. The debate is thus not so much about the validity and status of some traditional values. Rather, against the background of the post-idealist conception of reality as value-free and without meaning, the debate focuses primarily on the foundations of our understanding of the world and ourselves. Values traditionally treated by metaphysics, such as truth and morality, unity and plurality, value and reality, function as a framework to enable our understanding of, and dealings with, the world. Hence, the philosophy of values operates against the background of nihilism and aims at elucidating the principles of human existence and the world that humans live in.

In conclusion: The main schools of neo-Kantianism take the basic problem of philosophy to be that of the validity of our theoretical and non-theoretical endeavours. This problem is to be solved through a determination of the principles of validity. These principles are what make up the sphere of the "transcendental." The transcendental domain, therefore, is not to be confused with the psychology of an empirical subject or with the metaphysics of an absolute reality. Far from declaring the world we live in to be meaningless, the neo-Kantians aim to bring to light its philosophical foundations. Hence, they try to understand the rationality of our world and its meaning. The concept of culture functions as a universal and fundamental framework, a framework that was once occupied by metaphysics. This framework is now freed from ontological premises yet is still able to counteract nihilism.

2 Philosophy of Values and the Concept of Natural Law

What does all this mean for the concept of natural law and for the relationship between Kelsen and the Southwest School of neo-Kantianism? First, I will show that it is the transcendental turn concerning foundations of normativity that is prevalent as soon as discussions of natural law arise in the Southwest School. Already here, important differences between these neo-Kantians and Kelsen emerge. Second, I will show that Kelsen identifies reason with God and metaphysics, hence missing the point of the transcendental turn of the leading Southwest neo-Kantians. Kelsen takes Kant's philosophy not as a radical new

post-metaphysical way of thought, but as a type of metaphysics. He therefore fails to acknowledge both the material component of reason, so important for Southwest neo-Kantianism, and the distinction between two dimensions of foundations of normativity: a subjective and an objective dimension (in the sense of the Southwest School).

2.1 *Southwest Neo-Kantians on Natural Law: Heading for Transcendental Philosophy*

That the transcendental turn is relevant for discussing the relationship between Southwest neo-Kantianism and Kelsen is evident if we look at the scattered remarks about natural law of neo-Kantians like Windelband, Rickert, Bauch, Lask and Cohn – they focus on the natural law doctrine as a model of foundational thought that has to be sublated by the transcendental model, doing justice to its Platonic impetus including the distinction between an ideal and an empirical (positive) realm, while at the same time transforming the supersensible ideal realm into a realm of validity grounds (*Geltungsgründe*). To begin with, I will show the prevalence of the turn towards a transcendental approach. Then, I will illustrate this prevalence in greater depth on the basis of Bruno Bauch's essay on "the problem of law in the philosophy of Kant."

In his *Einleitung in die Philosophie,* Wilhelm Windelband emphasizes – in a way that is partly in agreement with Kelsen's analysis of the natural law tradition – that the opposition between natural law and positive law arose rather late, i.e., especially in the Renaissance.[30] Modern philosophy, striving for general knowledge with a timeless validity and orientated towards the natural sciences, was eager to develop also "law" from nature, at least from human nature, by means of pure thought, resulting in an opposition between two dimensions of law, as Windelband puts it ironically: the law of jurisprudence and the law of the professor.[31] Still, for Windelband this holds for the other disciplines of philosophy too. Hence, Kelsen's criticism seems to have a good point.

However, in conformity with his appropriation of Kant's transcendental philosophy, for Windelband, philosophy should not attempt to erect ideals, i.e., ideas *in individuo,*[32] but concern itself with the positive, with real phenomena. What distinguishes philosophy from other preoccupations with reality is its

30 Wilhelm Windelband, *Einleitung in die Philosophie*, 3rd ed., (Tübingen: Mohr Siebeck, 1923), 321.

31 *Ibid.,* 322.

32 Kant, KrV, B 596.

"perspective"; it is only because of this different perspective that philosophy is itself a meaningful undertaking.[33] According to the doctrine of the *factum* as a starting point for philosophical analysis, positive law functions for Windelband as a set of validity claims which has to be acknowledged. However, jurisprudence "presupposes" positive law in its manifold historical appearances as a "given." For Cassirer in his essay on natural law, as for Windelband, too, the further investigation of this presupposition is the "legitimate side of the conception of the former natural law doctrine." Its legitimacy is due to the validity problem intrinsically related to human endeavours – the fact that in society and jurisprudence we "assess" law is positive too. Making such assessments "objectively and universally valid," "justifying them scientifically," belongs to the "principle" of the "old natural law"; "hence, the philosophical perspective is here too that of a universally valid assessment of the value" (*Wertbeurteilung,* i.e., in this case: the assessment of the value of law).[34]

With this result, Windelband has reached the view typical for the neo-Kantian philosophy of values: philosophy as the "universally valid assessment of value." For him, in conformity with the overarching criticism of metaphysics in neo-Kantianism, exactly this aspect was "anticipated and intended, but accomplished completely mistakenly." Windelband, whose position in this respect prefigures that of Kelsen here, criticizes such erroneous metaphysical thinking which erects "a timeless valid ideal," utilized for "measuring positive law." The alternative of the Southwest school to this metaphysical aberration is – as indicated in the section about neo-Kantianism – to replace the "ideal" by a "purpose and task": by the purpose and task law has to fulfil, the purpose and task of which the meaning of law is itself comprised. From this validity-functional analyses of the meaning of law, the means for realizing law cannot be "deduced logically," i.e., the "error of the former natural law doctrine."[35] Instead, for Windelband, this task of realizing can only take shape as a "criterion for

33 Windelband, *Einleitung in die Philosophie*, 323. Quotes without reference refer to the last quoted page.

34 *Ibid.,* 324.

35 From Wilhelm Windelband, *Lehrbuch der Geschichte der Philosophie*, 17. Aufl., unv. Nachdr. d. 15., durchges. u. erg. Aufl., ed. Heinz Heimsoeth, (Tübingen: Mohr Siebeck, 1980), 370 f., it becomes clear, that Windelband here, in a similar manner to Cassirer in his essay on natural law, has in mind the so-called geometrical method (cf. on this and its problems for determining philosophical foundations: Krijnen, *Philosophie als System*, Chap. 0), so important for Grotius, Hobbes, Pufendorff, Thomasius, Wolff and others. Kant, then, as the opening sentence of Windelband's chapter on Kant states, integrated the various motives of the Enlightenment and transformed them into a "fully new conception of the task and the method of philosophy" (Windelband, *Lehrbuch der Geschichte der Philosophie*, 456.). Cf. Krijnen, *Nachmetaphysischer Sinn*, 2.4.2, for Windelband's view on this new method.

positive law."[36] It should be emphasized that this philosophical assessment of positive law does not concern the technical functionality or practicability of the system of positive law, law-making, the administration of justice etc.: this is the domain of jurisprudence – such "empirical" matters are not a theme of philosophy. Philosophy deals with the "purpose of law" in a different perspective – the perspective of "justice" (*Gerechtigkeit*). Philosophy of law is not empirically about the purpose of positive law, but about what the purpose of positive law *should* be: it is about what Windelband calls the "ethical purpose of law."[37]

In dealing with the natural law tradition, Windelband presents an un-Kelsenian, non-positivist, non-metaphysical but transcendental conception of law. The same focus, but accentuating aspects from the philosophy of science, is to be found in Rickert's *Grenzen der naturwissenschaftlichen Begriffsbildung*. Here, Rickert makes some exemplary remarks on natural law and its relation to historical, i.e., positive, law.[38] He emphasizes that the term natural law easily leads to metaphysical misunderstandings, taking the content of natural law as the "absolute reality," hence, "hypostatizing" the concept of generalities.[39] For Kelsen, as for Rickert, natural law mistakenly assumes the shape of the "truly real" law, that appears only "fouled and tarnished" in historical, positive law, leading to the effort to purify positive law as "appearance" via thought in order to re-establish its "metaphysical essence." In a similar manner to Windelband, Rickert criticizes rationalistic types of philosophy for falling victim to this: "only rationalist thought can believe in a 'natural' law" – a law that only contains "metaphysical hypostatized general concepts."[40] Rickert, therefore, on the one side is, for methodological reasons, very critical about the natural law tradition. He asserts the necessity for a "complete turning away from rationalistic and naturalistic thinking in favour of historical thinking" in order to overcome concept realism (i.e., hypostatizing concepts).

On the other side, however, as for Cassirer and Windelband, the question "which lies behind the discussions about the relevance of natural law" remains equally at stake for Rickert. Moreover, it now is possible to really get to "the problem of the philosophy of law": is it possible "to confront the mere

36 Windelband, *Einleitung in die Philosophie*, 324.

37 *Ibid.*, 325.

38 Heinrich Rickert, *Die Grenzen der naturwissenschaftlichen Begriffsbildung: Eine logische Einleitung in die historischen Wissenschaften*, 5. verb. u. erw. Aufl., (Tübingen: Mohr Siebeck, 1929), 721 ff.

39 *Ibid.*, 722.

40 *Ibid.*, 723.

historical law […] with a universally valid or 'normative' law"?[41] Hence, Rickert indicates the problem of the validity of positive law itself. Against the metaphysical tradition, focused on a supersensible reality, following the path of Kant's transcendental turn, law becomes, for Rickert, the "concept of a value" (*Wertbegriff*);[42] it also remains necessary to form a "valid concept of the value of law." This concept can, as for Windelband and Cassirer, only be "formal" (in the transcendental sense);[43] and it is equally the case for these thinkers, as for Rickert, that such a concept of law – in contrast to metaphysics of natural law – is compatible with positive law as it determines "what deserves the name law."

Hence, as Plato introduced the supersensible world of ideas in order to understand the sensible world and Kant the sphere of the transcendental to understand that of the empirical, Rickert introduces the concept of value. The philosophical problem of law for him is the quest for the principles of the validity of law as such. This surpasses the natural law tradition: according to Rickert, philosophy of law is not a natural law doctrine, but a "doctrine of the normative valid law." Striving philosophically for a materially fulfilled law – see Kelsen's reproach of a double order of a natural and a positivist law[44] – is reducible to the pursuit of a "phantom." Instead, philosophy should reflect transcendentally on the principles of validity of law as it occurs in history. As a result of such an intrinsic reflection on the meaning of law, philosophy develops the "formal concept of law."

The same concern animates Emil Lask, who explicitly refers to Windelbands's "fundamental principle of philosophical investigations," separating a philosophical, value perspective on reality and an empirical, positive perspective on reality.[45] His essay on *Rechtsphilosophie* contains a relatively extensive discussion, perhaps even the most extensive discussion by one of the main figures of South-West neo-Kantianism, of the natural law tradition. Here too, immediately, the transcendental point of view is brought in: Lask starts with

41 *Ibid.,* 723 f.

42 *Ibid.,* 724.

43 Not in abstraction from the content, but in relation to it; hence in the sense of a formality that defines the objectivity of the material, a material formality. See, on this, the last section of this chapter.

44 Cf. paradigmatically Hans Kelsen, "Naturrecht und positives Recht (1927/28)," in *Die Wiener rechtstheoretische Schule,* 215–244. This essay is organized around the discussion of positive law and natural law as two systems of norms that cannot be valid at the same time. Another fine example of his criticism is contained in Hans Kelsen, "Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus," 301 ff.

45 Emil Lask, "Rechtsphilosophie," in *Gesammelte Schriften*, ed. Eugen Herrigel, vol. 1, (Tübingen: Mohr Siebeck, 1923), 275–332, 287.

distinguishing between philosophy of law as a "metaphysics of natural law" and a "critical philosophy of law"; both address the "absolute meaning of law and justice," but they differ "fundamentally" as far as the relationship between the absolute value and empirical reality is concerned; hence, Lask distinguishes sharply between "natural law and a non-metaphysical philosophy of law."[46] Also for Lask, a critical philosophy of values overcomes the Platonic "dual world theory," typical of a metaphysics of law, by a "juridical one world theory"; this leads to the further distinguishing of the perspective of theory formation into two methods: a "philosophical and an empirical method," the philosophical method dealing with reality in its "absolute value content."[47] Critical philosophy of law is not concerned with a "superempirical law," rather, it is concerned with the "superempirical meaning of empirical law" and, therefore, with "assessing, evaluating" empirical law in its "ultimate legitimacy."[48] It thematizes the "ultimate formal goals of law, its place in the realm of cultural values, its relevance for life; it determines the transcendental place of law."[49] For Lask also, the natural law doctrine falls victim to "hypostasizing" values into a supersensible reality: it is "metaphysical rationalism, hypostasizing values of law into realities of law."[50] Before focusing systematically on methodological aspects of the science of law,[51] Lask examines the formal and material variants of the natural law doctrine, its deficiencies, and a philosophy of law proper, as well as the way in which the value of law in the system of values is conceived of in contemporaneous philosophy of law.

In conformity with this outline of the path of thought of the Southwest School, Jonas Cohn, in his voluminous *Wertwissenschaft,* devotes only a few words to natural law. For him, law has to be determined in terms of the system of values.[52] This "law of reason," then, functions as a criterion to "assess" "valid" law, i.e., state-made law. In accordance with the transcendental turn in conceptualizing the foundations of normativity, for Cohn, the idea of a law of reason establishes a set of norms for assessing positive law from within itself, as a set of enabling conditions (for outer actions),[53] hence, not, as in Kelsen's theory, as a methodological rule (for law-making).

46 *Ibid.,* 279, cf. 286.
47 *Ibid.,* 279 f.
48 *Ibid.,* 280.
49 *Ibid.,* 86.
50 *Ibid.,* 280.
51 *Ibid.,* 306 ff.
52 Jonas Cohn, *Wertwissenschaft,* (Stuttgart: Fromanns, 1932), 350.
53 *Ibid.,* 351.

Within the Southwest School, Bruno Bauch devotes an essay to *Das Rechtsproblem in der Kantischen Philosophie*.[54] This essay underlines the emphasis on the transcendental turn in thinking about law. Indeed, Bauch's essay essentially concerns the "demonstration of the problem of law" and its "place" in the "system of critical philosophy."[55] Bauch immediately turns towards the relevance of the "questio iuris, what is valid (*rechtens*)," in contrast to the "questio facti."[56] The *questio iuris* is supposed to be the truly "critical" one, and also encompasses the "method of critical philosophy (*Kritizismus*)." Following the orientation of the Southwest School, including its Kant interpretation, the focus of philosophy is upon the normative foundation of cultural phenomena, their "validity and value." The specific question of a philosophy of law, then, is the *questio iuris* concerning "law itself."[57] Bauch sharply distinguishes between the factual recognition of positive rules – validity as the fact of "subjective" recognition – and the "objective" meaning of validity: a notion of the validity of rules which is independent from their factual recognition.[58]

54 Bauch was rather influential within the philosophy of law too. From 1912, he was a co-editor of the journal *Zeitschrift für Rechtsphilosophie in Lehre und Praxis*. His pupils in the realm of philosophy of law extend from Julius Binder to Fritz Münch and Hans Welzel (as noted by Sven Schlotter, *Die Totalität der Kultur: Philosophisches Denken und politisches Handeln bei Bruno Bauch*, (Würzburg: Königshausen & Neumann, 2004), 114 f., notes 449 and 451). Although Lask gives a fine historically oriented South-West neo-Kantian description of the formal and material relevance of a 'critical' philosophy of law, of course acknowledging the idea of a system of absolute values (*ibid.,* 289 f.), systematically he focuses on the 'methodological' profile of a theory of law, the 'logic of the science of law' (*ibid.,* 306 ff.).

55 Bruno Bauch, "Das Rechtsproblem in der Kantischen Philosophie," *Zeitschrift für Rechtsphilosophie in Lehre und Praxis* 3 (1921),1, 2.

56 *Ibid.,* 3.

57 *Ibid.,* 4. Cf. also Bruno Bauch, *Immanuel Kant*, 3rd ed., (Berlin; Leipzig: de Gruyter, 1923), 356, where Bauch distinguishes a doctrine of law containing a set of empirical propositions from a "philosophical doctrine of law," applying Kant's *questio iuris* to the *ius* itself.

58 Bauch, "Das Rechtsproblem in der Kantischen Philosophie," 4 f. Also, in his article on ethics, Bauch develops the problem of law starting with the distinction between a subjective and an objective meaning of validity. Here it again becomes clear that, for Bauch, law is a timeless valid "value," having its place in a "system of values" (Bruno Bauch, "Ethik," in *Die Kultur der Gegenwart*, ed. Paul Hinneberg, 3rd ed. Teil I, Abt. 6, (Berlin; Leipzig: Teubner, 1924), 239–275, 268 and 259 f.; cf. on this also Christian Krijnen, "Entstellter Kantianismus? Zum Problem der Konkretisierung des Guten in Bruno Bauchs Ethik," in *Philosophie und Zeitgeist im Nationalsozialismus*, eds. Goran Gretić and Marion Heinz, (Würzburg: Königshausen & Neumann, 2006), 251–268). Justice, then, turns out to be a relationship between 'is' and 'ought,' value and reality, and hence, law and justice are, for Bauch, intrinsically related to each other – unlike in Kelsen's positivism.

Misunderstanding this distinction leads to a result we can find in Kelsen's work: in conformity with the methodological impetus of his basic norm, "valid law" (positive law) is "correct law" (*richtiges Recht*), incorrect law a contradiction. For a Kantian type of philosophy, the question about valid law in the positivist, Kelsenian, sense is not the true philosophical one, because it is a *questio facti:* it concerns subjective validity. Philosophy should deal with the *questio iuris,* the objective validity of law, with the objective value of law which ought to be recognized subjectively.[59] This objective dimension of law is "presupposed" in order to be able to determine any historically existing social-psychological fact as "law"; this determination presupposes the "objective validity" of law as an "objective criterion" – i.e., the proper problem of a philosophy of law.[60] Hence, from this outline of the Kant interpretation of the Southwest neo-Kantian perspective, Kelsen's recourse to a methodology of law-making on the basis of a historical first constitution is nothing but a dogmatic type of reasoning, failing to do justice to the capacity of reason and, consequently, to understand and account for the normative claims entailed in law.

For Bauch, this objective law is not the historical, positive law, but the "idea" of law.[61] This idea is presupposed in qualifying any factual appearance as an appearance of law, presupposed in any discussion of the development, progress or decline of law, presupposed also in the process of distinguishing between law and injustice (*Unrecht*) etc. The idea of law concerns law in terms of tasks and purposes. Realizing the idea of law is an infinite task for subjects. On the one side, Kelsen is not a primitive positivist in the sense that for him all subjectively valid law is law: Kelsen's basic norm is a non-positivist foundation of law. Kelsen himself even sees here a certain familiarity between his *Reine Rechtslehre* as a "theory of legal positivism" and the natural law tradition.[62] On the other, more important side, however, for Kelsen's positivism the "validity" of positive law does not depend on its "content," but on its being generated according to the basic norm. Kelsen rejects any higher, "unconditional," "moral-political," "fix" criterion for assessing positive law.[63] Hence, he does not accept the idea of law as a normative set of values formally determining the content of law. Kelsen's basic norm is not an equivalent for the neo-Kantian idea of law. According to the neo-Kantians, law founded on this idea is positive

59 Bauch, "Das Rechtsproblem in der Kantischen Philosophie," 6.
60 *Ibid.,* 6 f.
61 *Ibid.,* 8 f. Cf. for Bauch's concept of the idea Krijnen, *Philosophie als System*, 5.3.2 f.
62 Hans Kelsen, "Vom Geltungsgrund des Rechts," 1426 f.
63 *Ibid.,* 1425, 1427. See, on this, the next section.

law: subjective recognition of norms is based upon objective law. Of course it could be that a specific law generated according to Kelsen's basic norm fulfils the objective conditions of law – but Kelsen's subjective, positivist, factual orientation hinders the further determination of this ultimate foundation of law itself, leaving it implicit and only operative in the background instead of making it explicit philosophically. Bauch stresses that Kant's "rational philosophy of law" and pre-Kantian "rationalism" are really two worlds apart from each other; for him, Kant's transcendental philosophy integrates fruitfully the historical development of positive law in a transcendental, non-metaphysical conception of the idea of law.[64]

2.2 *Reason versus God as Source of Normativity*

Already the programmatic impetus of Kant's transcendental philosophy, going beyond metaphysics and empiricism, sheds light on the overarching and decisive aspect of Kelsen's philosophy of law as a sublated, consequent and prominent form of positivism: *the concept of reason*. As we have seen, pre-Kantian metaphysics holds that grounds for the objective validity of human endeavours are secured by supersensible, "transcendent" beings. Empiricists conceive of such grounds as being guaranteed by "immanent" (sensible) beings, making it, however, incomprehensible as to how truly human, self-determined and at the same time intersubjectively valid orientation is possible. Against both metaphysics and empiricism, Kant paradigmatically holds and shows what it means to approach the subject of foundations (principles, validity qualifications) philosophically. According to what is historically known as his historical Copernican turn, and what is called from a philosophical point of view his transcendental turn of the foundational project of philosophy, certainty with regard to the validity of human endeavours can only be reached by the transcendental route. On this route, to use the usual (though non-Kantian) term, "subjectivity" turns out to be the principle of "objectivity," of possible relations to objects, hence the ground for validity. Subjectivity here stands for the entirety of the faculties of the subject; an entirety of faculties that can neither be naturalized nor culturalized in the sense of a mere multicultural plurality.[65] In another terminology, such subjectivity is called *reason* (*Vernunft*). Transcendental knowledge of human endeavours leads to a set of grounds for validity, a set of values (as a transcendental

64 Bauch, "Das Rechtsproblem in der Kantischen Philosophie," 12.

65 This philosophy of subjectivity is, therefore, also not to be confused with a kind of egology: subjectivity as a set of principles of validity is conceived of as a "general" subjectivity, binding all "human subjects" as it defines what it means to be human.

philosophy of values would express it), which cannot be understood by referring to something *outside* the structure of these endeavours themselves, i.e., by the reference to some kind of a being as in metaphysics or empiricism. It can only be understood by reference to the validity claim and validity structure of human endeavours themselves.[66]

Kelsen, however, surprisingly enough and based on a number of basic misunderstandings, time and again presents Kant as a metaphysical thinker, i.e., as representative of the natural law tradition[67] as conceived by Kelsen.[68] Moreover, and from a programmatic point of view, what is both central and striking is that Kelsen, in his discussion of the natural law tradition without further ado continuously identifies (objective)[69] reason as a source of normativity with God. Natural law is not an artificial product, established (*gesetzt*) by humans,

66 With this reference to the claim of human endeavours themselves, transcendental knowledge is about humanity, about what makes us human, about the *humanum*: the normative dimension of human thinking and acting. The fundamental factors guiding concrete subjects, therefore, are no longer metaphysical entities, but values which are defining aspects of humanity itself. They are valid categorically, "transcendent" in the sense that their validity does not depend on their factual recognition; on the contrary, they should be recognized because they contain what it means to be human, hence to think and act at all. They immediately determine the validity of such thinking and acting, and, with that, the thinking and acting subject. As their categorical validity is part of the validity claims of that subject itself, they are at the same time "immanent": the subject forms itself by being determined by values which belong to its own status as a subject. The harsh critique that the philosophy of values falls short because of its dogmatic "realism of values," falls short itself.

67 For Kelsen, Kant's *Metaphysik der Sitten* even counts as the "most perfect expression of the classical natural law doctrine", (Hans Kelsen, "Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus," 349); in sum, he writes, Kant's ethics ends where Aquinas left it five hundred years before (Hans Kelsen, "Die Grundlagen der Naturrechtslehre (1963)," in *Die Wiener rechtstheoretische Schule: Schriften von Hans Kelsen, Adolf Merkl und Alfred Verdross*, eds. Hans Klecatsky, René Marcic and Herbert Schambeck (Wien [et al.]: Europa, 1968), 869–912, 907).

68 Cf. Hans Kelsen, "Naturrecht und positives Recht," 236, 242 ff. Kelsen, "Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus," 348 ff. Kelsen, "Die Grundlagen der Naturrechtslehre," 905 ff. Kelsen, "Zum Begriff der Norm (1965)," in *Die Wiener rechtstheoretische Schule: Schriften von Hans Kelsen, Adolf Merkl und Alfred Verdross*, eds. Hans Klecatsky, René Marcic and Herbert Schambeck, (Wien [et al.]: Europa, 1968), 1455–1468, 1463.

69 In contrast to "subjective" reason as "human reason, as it is simply given" (Hans Kelsen, "Die Idee des Naturrechts (1927/28)," in *Die Wiener rechtstheoretische Schule: Schriften von Hans Kelsen, Adolf Merkl und Alfred Verdross*, eds. Hans Klecatsky, René Marcic and Herbert Schambeck, (Wien [et al.]: Europa, 1968), 245–280, 247 f.).

but has as its ground of validity "Nature, or God, or Reason."[70] Finally, this all boils down to the thesis that the foundation of the natural law doctrine is a religious based conception of the source of normativity: the "belief in […] God," hence a belief not based on "rational arguments,"[71] a source resulting from a transgression of "logical-rational thought," of the "empirical reality" towards a "transcendent, metaphysical" realm, an advancement "from man to God, from science or philosophy to theology."[72] On the basis of the above sketch of neo-Kantianism and its appropriation of Kant, we can clearly see that Kelsen's interpretation of Kant concerning the source of normativity is diametrically opposed to that of the neo-Kantians. For them, reason is conceived of as non-metaphysical, as subjectivity in terms of a set of values, ideas or principles that functions as a ground of validity or objectivity.

Kelsen, by contrast, only has a *subjective* notion of reason or rationality,[73] leading him, among others, to his positivist idea of constructing law, the hypothetic validity of norms and the scientific renunciation of justice as the content of law. Because of his subjective conception of human reason, he exactly misses the *objective* meaning of reason leading the Southwest neo-Kantians in their determination of law (and other forms of normativity).

As mentioned, the neo-Kantians follow Kant's idea of transcendental logic as a material logic, i.e., a logic not of forms in abstraction from the content, but in relation to objects.[74] The formal character of transcendental logic is a material formality, a formality defining the material, the object in its objectivity, leading to a primacy of logic instead of a primacy of ontology. Indeed, for the

70 Cf. the various formulations in Hans Kelsen, "Naturrecht und positives Recht," 215, 235, 241. Kelsen, "Die Idee des Naturrechts," 247 ff. Kelsen, "Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus," 283. Kelsen, "Die Grundlagen der Naturrechtslehre," 875, 905. Cf., too, Kelsen, *Reine Rechtslehre*, 365 f. with 368–374 and 415 ff.

71 Hans Kelsen, "Die Grundlagen der Naturrechtslehre," 869, 873.

72 *Ibid.,* 873. Kelsen, then, tries to show the "theological character" of the natural law doctrine via historical analyses, esp. addressing Aristoteles, Acquinas, the Stoa and Kant (*ibid.,* 875 ff.). Cf. Hans Kelsen, "Vom Geltungsgrund des Rechts," 1421, 1425. Kelsen, "Die Idee des Naturrechts," 257. Kelsen, *Reine Rechtslehre*, 404 ff.

73 Even terminologically, Kelsen distinguishes reason as an "objective" (divine, metaphysical) reason from reason as "human reason," favouring this "subjectivist turn" (Hans Kelsen, "Die Idee des Naturrechts," 248.). See, also, for example, Kelsen, "Naturrecht und positives Recht," 215: Here he speaks of the classical source of normativity (God, nature, reason) being an "objective principle," in contrast to norms which are valid because they are made by a certain human authority, hence by humans; the latter is qualified as a "formal" ground for validity or principle, the first as a "material" ground for validity or principle. Cf. Kelsen, "Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus," § 3, and Kelsen, "Die Idee des Naturrechts," 249.

74 Kant, *Kants gesammelte Schriften*, KrV, B 79 ff.

neo-Kantians "forms" are not just "formal" in abstraction from the content, but have a material meaning: in a validity functional sense of the word they make up the foundations of possible objects; they are formal because they consist of the validity functional structure of objects, i.e., they are the principles of objectivity – as demonstrated by the Southwest School, especially Rickert in the course of his so-called "heterology of thought" and Bauch in his deliberations on the validity functional meaning of concepts have shown.[75] As far as law is concerned, transcendental foundations also concern, non-naturalistically, the conditions positive law-making has to fulfil formally and materially to be truly law and not mere formally correct established legal injustice.

By contrast, Kelsen's basic norm is qualified by a formal type of rationality which *abstracts* from the content: any content can be law, provided the law-making process is correct. Kelsen is, of course, concerned with the formal conditions of valid law-making. Yet, the foundations of law require more than these types of conditions: to its necessary conditions belongs the content too, a content which is part of *reason in the objective, transcendental sense,* determining the objectivity of law. The determination of the principles of law as law are a result of a process of philosophical reflection, of an immanent reflection on the meaning claimed positively, of a transcendental deduction taking its starting point in the factual claim of factual law systems and aiming to show, determine and justify the principles of the claimed validity in the mode of philosophical scientific knowledge, hence in terms of necessarily valid knowledge of necessary conditions.[76]

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75 Cf. Krijnen, *Nachmetaphysischer Sinn*, 5.3.4.3. Following Kant's concept, the neo-Kantians take logic in its function for our knowledge of objects and their determination, hence they develop an understanding of logic which is knowledge functional and in that sense objective: logic is an "epistemological," hence an "objective" logic. Cf. *ibid.:* regarding Windelband, cf. 2.4.2, esp. note 81, regarding Rickert cf. Chap. 4, regarding the Marburg School, Husserl and later transcendental philosophy cf. p. 292, note 78.

76 This idea of philosophical justification of normative foundations should also be distinguished from the idea that the origin of law is "invisible," as William E. Conklin, *The Invisible Origins of Legal Positivism: A Re-Reading of a Tradition*, (Dordrecht/Boston: Kluwer, 2001) holds, or even "mystical" and itself without ground, as Jacques Derrida, "Force of Law: The Mystical Foundation of Authority," *Cardozo Law Review* 11 (1990), 920 thinks. Although contemporary fiction theory has a point in interpreting Kelsen's basic norm in terms of a "fiction" – in his final works Kelsen does so himself, referring to Vaihinger's Philosophy of As-If (cf. on this the recent discussions in Torben Spaak, "Kelsen and Hart on the Normativity of Law," *Scandinavian Studies in Law* 48 (2005), 398, 405 f., and Uta Bindreiter, *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine*, (The Hague/London: Kluwer, 2002), 36 ff.), from the point of view of a Kantian, neo-Kantian transcendental philosophy, necessary presuppositions are not fictions, but objectively valid determinations. Cf. Olaf J. Tans, "The Imaginary Foundation of Legal Systems – a

Kelsen's hierarchy of legal norms culminates in a *hypothetical basic norm* that orders the members of society to behave in conformity with the norms that ultimately derive their validity from the constitution, to be more precise: the basic norm is the final authorization (*Ermächtigung*) of legal norms. The constitution is the origin of the legal order, surmounted by the hypothetical basic norm only to make the highest ordering acts intelligible as acts in conformity with a norm. Hence, we clearly see: the hypothetical basic norm replaces the objective foundation of the natural law tradition Kelsen criticizes continuously – God, Nature, Reason – as most fundamental level of the hierarchy. The problems of a substantive order are eliminated. Whatever power establishes itself effectively in a society is the law-making power, and under its hypothetical norm, whatever rules it makes are the law. The basic norm is a norm for generating positive law and in this sense *purely formal.* The classic question of the philosophy of law, the question of *just and unjust* orders, does not belong to the science of law and its philosophy (not even to science at all).[77] Kelsen repeatedly discusses not only the presupposition of a hypothetically (relatively) valid ultimate norm, but also the elimination of justice as the content and validity criterion of positive law.[78]

Mimetic Perspective," *Law & Literature* 26, no. 2 (2014), 127 for an attempt to discuss the "invisible" foundations of law in terms of fictions. Indeed, the transcendental option of dealing with philosophical foundations does not play a systematical role here (although Tans suggests that because foundations are "inaccessible, or invisible, or transcendental, or purely hypothetical" they may be called "imagination […], or fiction" (§ 1)). In Tans' approach too, the perspective of the subject, its experience of foundations, becomes central, and not the objective validity of the foundation itself.

77 For a critique of this agnostic claim, also held by contemporaries like Simmel, Weber, Jaspers and others, see Christian Krijnen, *Nachmetaphysischer Sinn*, 7.3.2.3 and Krijnen, "Rational Foundations of Knowledge and Values," in *Metaphysical Foundations of Knowledge and Ethics in Chinese and European Philosophy,* eds. Guo Yi, Sasa Josifovic, and Asuman Lätzer-Lasar, (Paderborn: Fink, 2014), 177–191.

78 Kelsen's *Reine Rechtslehre* follows this conception of law: here too, the basic norm makes up the foundation of the validity of positive law (Kelsen, *Reine Rechtslehre*, 8.). This norm is not generated (posed) itself, but presupposed (*ibid,* 47). Though the ultimate ground of the legal order, its validity remains only hypothetical (*ibid*). It functions as a rule for generating a system of positive laws and therefore is purely formal (*ibid,*199). The basic norm delegates the law-making power to a certain legal authority, without binding it concerning the content, "any content can be law," its validity relies solely on its construction in conformity with the basic norm: justice is not the criterion of the validity of law (*ibid,* 201, cf. 199 ff., cf. 50 f.). See, for the basic norm as foundation of positive law, also: Hans Kelsen, "Die Idee des Naturrechts," 255 ff. Kelsen, "Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus," §§ 3 f., 9 f., 35 ff. Kelsen, "Vom Geltungsgrund des Rechts," 1421 ff., 1427.

2.3 *Subjective and Objective Foundations of Law*

With this, finally, we can carve out again an essential and programmatic difference between Kelsen and the Southwest school of neo-Kantianism: the difference and relatedness between a *subjective and an objective foundation of normativity.* In this respect, Rickert famously and paradigmatically distinguished two ways of philosophical investigations.[79]

According to Rickert, human endeavours as such have the structure of taking an alternative position towards values. Values are, from the perspective of the subject, the point of orientation for its endeavours; a subject recognizes values, namely, that for a subject values are the determining factors of its actions. Hence, the subject subjects itself to an "ought" and with that amends its criteria for determination from factors of reality to factors of validity.

Having taken this into consideration, it is now possible to grasp the twofold character of culture, and with that of reason, much discussed in the Southwest school. For Rickert, neo-Kantian philosophy always deals with the validity (measure, criterion) of human endeavours. These have to be determined with regard to two aspects:

(a) They concern or relate to an *object:* the objectivity of endeavours is at stake here.

(b) Human endeavours are endeavours of a *subject:* the subjectivity of endeavours is at stake here. Any formation of meaning, hence culture, has the structure of a subject that is related to values guiding its actions. By recognizing values it shapes culture. All philosophical disciplines, then, treat values and their actualization by subjects; i.e., philosophy has a noematical (objective) focus and a noetical (subjective) one.

Normativity is characterized by a *reciprocal* relationship between a subjective, validity-noetic dimension concerning intentionality, and an objective, validity-noematic dimension concerning the content.[80] This reciprocal relationship,

79 See, for his doctrine, especially: Heinrich Rickert, "Zwei Wege der Erkenntnistheorie." Rickert, "Urteil und Urteilen," *Logos* 3 (1912), 230. Rickert, *Der Gegenstand der Erkenntnis*. This theme is extensively discussed in Krijnen, *Nachmetaphysischer Sinn*, Chap. 6, and, among others, in "Gegenstandskonstitution bei Husserl und in der klassischen deutschen Philosophie: eine problemgeschichtliche Deutungslinie," in *Husserl und die klassische deutsche Philosophie,* eds. Faustino Fabbianelli and Sebastian Luft, (Springer, 2014), 115–131.

80 Nota bene, this use of the terms "subjective" and "objective" is not to be confused with Kelsen's use of subjective and objective meaning. Kelsen's (widespread) usage only concerns a difference in Rickert's sense of the objective dimension, i.e., it concerns the validity of norms in their noematical dimension. Cf. on this Krijnen, *Nachmetaphysischer Sinn*, 499 ff., Christian Krijnen, "Bedeutung," in *Handbuch Kulturphilosophie*, ed. Ralf Konersmann, (Stuttgart; Weimar: Metzler, 2012), 279–287.

however, is only the one side. The other side is that normativity contains a *primacy* of the objective dimension. It can be shown that this is also the case in Kant's and Hegel's philosophy, in contrast to philosophies which grant a primacy to the subjective dimension: phenomenology, *Lebensphilosophie*, philosophical anthropology, speech-act theory, discourse theory and any other approach understanding normativity from the point of view of the subject, its actions, constructions etc.

Kelsen's positivism and its conception of the validity of positive law apparently is an instance of a philosophy giving the primacy to the subject, versus the "objective" principle of the natural law doctrine. The problem of such a primacy, however, is, as Rickert has clearly shown (but in their own fashion Kant and Hegel too), that it rests on a *petitio principii*:[81] Indeed, explaining normativity from the noetic point of view presupposes an objectivity in relation to which the subject, its actions and results are determined. Hence, the subjective approach draws upon normativity in the objective sense; otherwise the phenomenon in question would not even concern a phenomenon of meaning, of normativity, but at the most a natural process. It should be emphasized that the problem is not so much that the noetic approach presupposes objectivity, but that it cannot justify this presupposition itself. Hence, it requires, as its necessary compliment, a validity-noematic approach, determining objectivity or normativity not from the perspective of or in its relation to the subject, but in itself. The merely presupposed objectivity makes the philosophical determination of the subjective dimension of normativity itself possible. In that sense, the subjective approach has a dogmatic character.

It is the distinctive shape of this dogmatic character of a presupposed objectivity in Kelsen's philosophy of law which will form the final focus of this chapter.

As far as Kelsen and his focus on positive law as a human construction is concerned, the presupposed objectivity evidently has to be linked to the doctrine of the basic norm. From a scientific point of view, the first false premise of this doctrine is its appeal to a first historical legal order as a necessary presupposition of law. This first historical legal order is the most fundamental point of origin of the further hierarchical development of the legal order. We could call it an axiom, even a dogma as it requires no further foundation. Yet, it is exactly because of this dogma that law obtains its intersubjective validity, i.e., it formally replaces the notion of justice. For Kelsen, the

81 Heinrich Rickert, "Zwei Wege der Erkenntnistheorie," 190 ff. Rickert, *Der Gegenstand der Erkenntnis*, 245 ff. 292.

normativity of law is always relative and hypothetical; it is not based on an objective principle, but results from human actions, following a generative method of law-making. The value of this method itself is only "hypothetically" "presupposed":[82] *If* it is presupposed that a certain institution is authorized as law-maker, *then* correct law is law made by this institution. This presupposition of a highest legal authority, established by the basic norm, is the validity ground of the norms of a legal system. Within the realm of positive law, however, the validity of this presupposition of a highest legal authority remains "unjustified and unjustifiable." That Kelsen criticizes the alternative, i.e., a "material" justification of law as intended by the natural law doctrine, for introducing "metaphysics" into experience, seems rather ironical, as his own unjustified and unjustifiable presupposition is itself a fine example of metaphysics. For, at least in relation to the dogmatic character of the presupposition there is no essential difference.

Kelsen specifies this most fundamental presupposition from which all legal norms ultimately derive their validity in terms of a "historical first constitution."[83] It is *presupposed* by jurisprudence *that* this first historical fact has, indeed, the normative meaning of being a constitution. This is presupposed as, otherwise, the normative character of this first historical fact would be lacking.[84] Of course, this presupposition cannot be justified by any empirical

82 See, for this and the following sentences, Hans Kelsen, "Die Idee des Naturrechts," 256 f. Cf., too, Kelsen, "Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus," § 4; Kelsen, "Vom Geltungsgrund des Rechts," 1421 ff; Kelsen, "Die Rechtswissenschaft als Norm- oder Kulturwissenschaft," 75. Remarkably, Kelsen himself accepts the criticism that there is a certain "similarity" between the natural law doctrine and his own pure theory of law regarding the fact that positive law has its foundation in a non-positivist norm (Kelsen, "Vom Geltungsgrund des Rechts," 1426 f.). Kelsen replies to this criticism by stressing the *differences* between both theories. Such a reply, however, leaves the accusation of a non-positivist foundation *fully* intact! In terms of Southwest neo-Kantianism: of an only presupposed, hence dogmatic objectivity.

83 See, for the doctrine of the historical first constitution: Hans Kelsen, "Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus," § 4; Kelsen, "Vom Geltungsgrund des Rechts," 1422 f; Kelsen, *Reine Rechtslehre*, 47, 203, 242.

84 Cf., too, Hans Kelsen, "Vom Geltungsgrund des Rechts," 1423 f.: other interpretations of human relationships are possible, for example, that they are nothing but relations of power; a "normative-juridical interpretation" presupposes the basic norm. I have pointed out elsewhere, through discussion of the work of Paulson, that in the course of the neo-Kantian transcendental argumentation, alternative interpretations of the factum with which philosophical analysis commences necessarily reveal themselves as inferior; hence transcendental argumentation has to show its superiority and with that its exclusivity (cf. Krijnen "The Juridico-Political in South-West neo-Kantianism" note 25).

(historical) investigation, as it still would remain presupposed that the empirical findings are indeed law. Not without reason Kelsen stresses that it concerns the most basic norm, a norm which can only be "thought"; a norm which is in no way "posed" but "presupposed" – unfortunately, we should say, "only" presupposed.[85] On this basis, for Kelsen the law-maker has a "carte blanche" concerning the "content" of the laws made.

Clearly, such a constellation is a rather precise translation of the *petitio principii* belonging to the subjective approach described above into the foundations of Kelsen's philosophy of the normative realm called law. Law, as conceptualized by Kelsen, draws its own normativity from an objective dimension it cannot account for within itself, i.e., within Kelsen's approach; hence, Kelsen's determination of law lives parasitically.

It is obvious, too, that the programmatic differences between Kelsen and the Southwest neo-Kantians must lead to, and will be accompanied by, further differences. For sure, these would cover, among others, the idea of a system, its openness, closedness, static and dynamic character.[86] For the thesis presented and defended above, however, going into to this is not necessary. Apparently, Kelsen's partial appropriation of elements of Southwest neo-Kantianism takes place within a different, non-transcendental programmatic setting. Kelsen clearly recognizes that the normativity of positive law must, in addition, be considered in regard to its positive validity. Kelsen, however, fails to recognize that this validity can only be thematized sufficiently within the framework of a non-positivist philosophy of validity.[87] The challenge would be to reconcile both – a challenge neither Kelsen nor the Southwest neo-Kantians really succeeded to cope with.[88]

85 *Ibid.,* 1423.

86 Cf., on the concept of a philosophical system, Krijnen, *Philosophie als System.*

87 In his early, lengthy and very critical article on the Southwest School, discussing main figures as Rickert and Lask, Kelsen concentrates on the philosophy of science, hence, the scientific profile of the science of law. Yet, already in this context, Kelsen needs to reject the idea of an "absolute" value and to bring in his own concept of a "relativistic stance," including the "formal" character of the value of positive law and the elimination of justice as the validity criterion of positive law (cf. Kelsen, "Die Rechtswissenschaft als Norm- oder Kulturwissenschaft," 76–80, 86, 93.).

88 At least in this respect the criticism of Hans Welzel, *Naturrecht und materiale Gerechtigkeit*, 4th ed., (Göttingen: Vandenhoeck und Ruprecht, 1962), 190, that the neo-Kantian philosophy of law falls short, not because of its formalism, but because of its retention and stabilization of the positivist concept of law, seems to retain its continued pertinence. To elaborate it would involve another study going into the doctrinal aspects of neo-Kantian philosophy of law.

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