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Dualism and Kelsenian Monism

The relationship between international and national law is a topic of great importance. Generally, the floor has been divided between dualism (Section 1.1), as developed by Heinrich Triepel, and monism (Section 1.2), mainly formulated by Hans Kelsen, both of which need to be reviewed critically from today's perspective. I argue that these theories can no longer comprehensively explain the relationship between international and EU law or EU and national law and that due to their emergence almost a century ago, they must be understood in their historical context. Current challenges posed by international or supranational organizations such as the EU, and the development of international law in general, overburden these outdated theories.

1.1 DUALISM: LIBERATION FROM INTERNATIONAL LAW AS "EXTERNAL STATE LAW" 125 YEARS AGO

The international and national legal orders are "two circles, which possibly touch, but never cross each other."[4] This is the famous statement made by the then only thirty-year-old Heinrich Triepel in 1899, which forms the cornerstone of the dualistic divide of international (or EU) and national law. Dualism's divide of legal orders was primarily based on the view that the law of the international (or EU) and national legal orders emanate from different sources, leading to the supposition that international (or EU) law and national law arise from different legal orders relying on different grounds for validity.[5] Although it still holds true that international, EU and national law emanate

[4] Heinrich Triepel, *Völkerrecht und Landesrecht* (C L Hirschfeld 1899) 111 [emphasis omitted; translation in the text by the author].

[5] Dionisio Anzilotti, *Lehrbuch des Völkerrechts* (W de Gruyter 1929 German translation by Cornelia Bruns and Karl Schmid) 38–39.

from different sources, dualism also assumes that the addressees and content of international and national law cannot be identical.[6] Thus, dualism turns a blind eye to direct interaction between international law and individuals. It does so by stating that international law is purely inter-State law and can only stipulate obligations for States;[7] nor does international law share the same addressees with EU or national law.[8] The division of the legal systems implies that international law may not derogate from national law, and national law may not derogate from international law.[9] In order to give international law an effect within a national legal system, dualism demands a special procedure to transform or incorporate the international norm into a national norm.[10] As a result, the basis of validity of international law within national law rests solely within national law, and the basis of validity of EU law within national law rests, too, solely within national law.

Dualism faces serious difficulties explaining the basis of international or supranational organizations, because, according to dualism, there would be one international and as many *x*-national bases of validity of international or supranational organizations as there are Member States.[11] In other words, the validity of an international organization would have to be divided up over its Member States instead of having a uniform validity. Equally hard to grasp is the concurrent (dualistic) assumption that international, EU and national law

[6] Triepel (n 4) 9, 11, 228–229; Anzilotti (n 5) 41–42.

[7] Triepel (n 4) 119–120, 228–229, 271; Anzilotti (n 5) 41 ff. Gustav A Walz, *Völkerrecht und staatliches Recht: Untersuchung über die Einwirkungen des Völkerrechts auf das innerstaatliche Recht* (W Kohlhammer 1933) 238–239, was considered to be a moderate dualist, yet he did not postulate the impossibility of international law addressing individuals. He stated in 1933 that the character of international law at the time was "mediatized" through municipal law.

[8] This criticism was already expressed by Alfred Verdross, "Die normative Verknüpfung von Völkerrecht und staatlichem Recht" in Max Imboden et al (eds) *Festschrift für Adolf Julius Merkl zum 80. Geburtstag* (Wilhelm Fink 1970) 425–441 (432 ff); Riccardo P Mazzeschi, "The Marginal Role of the Individual in the ILC's Articles on State Responsibility" (2004) 14 Italian Yearbook of International Law 39–51 (42–43) with further references in n 12: "This means that international law now regulates some relationships between States and individuals in a formal manner (and not only in a substantive one)"; ICJ *LaGrand (Germany v USA)* Judgment ICJ Reports [2001] 466, 494 para 77.

[9] Triepel (n 4) 257–258; Anzilotti (n 5) 38.

[10] Anzilotti (n 5) 41, 45–46.

[11] Stefan Griller, "Völkerrecht und Landesrecht" in Robert Walter et al (eds) *Hans Kelsen und das Völkerrecht – Ergebnisse eines Internationalen Symposiums in Wien* (Manz 2005) 83–120 (97); see also the general criticism by Joseph G Starke, "Monism and Dualism in the Theory of International Law" (1936) 17 British Yearbook of International Law 66–81. For an attempt to save dualism, see Gaetano Arangio-Ruiz, "International Law and Interindividual Law" in Janne Nijman and André Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007) 15–51 (22).

by default cannot have the same content or addressees.[12] This assumption is flawed as it would make norm conflicts between international, EU and national legal orders impossible, which is not the case. Norms from overlapping legal orders conflict constantly. If, for instance, EU law never conflicted with national law, the primacy of EU law would be meaningless.

While these flaws are obvious for us today, it was not so when dualism was emerging at the turn of the twentieth century. One flaw that is evident today is the dualistic assumption that international law (EU law did not even exist at that time) is purely inter-State law and so can only oblige States but not individuals.[13] While this was certainly true when Heinrich Triepel was shaping dualistic thinking, it can no longer be perceived as an accurate depiction of international law today. International law nowadays also addresses individuals directly and shapes national law in many ways. Moreover, trying to fit EU law and its relationship with international and national law into a dualistic scheme is like attempting to square the circle, as the dualistic assumptions do not match our understanding of EU law, which has at its core primacy and direct effect. EU law is binding on national authorities and the basis of validity of EU law is not dependent on national law. Moreover, if there is a conflict between EU and national law, EU law takes precedence over national law.

Historically, dualism was progress, as the separation of international and national law helped international law become independent. Thus, dualism liberated international law from being understood as "external State law,"[14] and was even referred to as a "cleansing thunderstorm" by the monist Alfred Verdross.[15] In sum, the legal landscape has changed drastically since the turn of the twentieth century, and the core assumptions of dualism are no longer correct. As a consequence, dualism fails to explain the relationship between international, EU and national law today.

1.2 KELSENIAN MONISM: A QUEST FOR PURITY AT THE EXPENSE OF PLAUSIBILITY

The main characteristic of monism is the assumption of a single unified legal system. Monism was developed most prominently by Georges Scelle, Hans

[12] Triepel (n 4) 9, 11, 228–229, 254 ff; Anzilotti (n 5) 41–42.
[13] Triepel (n 4) 9, 11, 228–229, 254 ff; Anzilotti (n 5) 41–42 with further references.
[14] For the term "äußeres Staatsrecht," see Georg W F Hegel, *Grundlinien der Philosophie des Rechts* (Nicolai 1821) §§ 330 ff.
[15] Alfred Verdross, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten* (Engelmann 1920) 34 "[R]einigendes Gewitter."

Kelsen and Alfred Verdross at the beginning of the twentieth century.[16] It is Kelsenian monism – and to some extent this also includes Verdross' conception – that still enjoys substantial popularity and is arguably the most sophisticated account of monist theories. Therefore, I will focus on Kelsenian monism, which must face the criticism of having a highly fictitious understanding of the world: nothing less than the "unity of the legal world order" is proclaimed.[17]

According to Kelsen, a legal order is a multiplicity of general and individual norms that regulate human behavior.[18] This multiplicity constitutes an order if it forms a unity. Unity in turn is established if these norms have the same basis for validity.[19] This understanding is based on the famous Kelsenian chain of validity, because the unity of a legal order is formed by the chain of validity.[20] Therefore, this understanding of a legal order is necessarily connected with the Kelsenian pure theory of law because law has to be perceived from one perspective as an noncontradicting single entity.[21] It is this understanding that undergirds Kelsenian legal monism, stating that if international, EU and national law are valid legal orders, they have to form a unity.[22] Different legal orders can only be considered valid if they have the same basis for validity.[23] The relationship between these legal orders must then be conceived of in either hierarchical or horizontal terms with separated spheres of validity. The latter conception, however, necessitates a higher order that entails a norm being the basis of validity for both legal orders.[24]

[16] Hugo Krabbe, *Die moderne Staatsidee* (Nijhoff 2nd ed 1919); Léon Duguit, *Souveraineté et liberté* (Éditions La Mémoire du Droit 1922); Georges Scelle, *Précis de droit des gens: Principes et systématique Vol I* (Librairie du Recueil Sirey 1932); Hans Kelsen, "Les rapports de système entre le droit interne et le droit international public" (1926) 14 Recueil des Cours de l'Académie de Droit International 227–331 (299); Alfred Verdross, "Le fondement du droit international" (1927) 16 Recueil des Cours de l'Académie de Droit International, 247–324 (287); Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (Oxford University Press 2018); for an overview see Christine Amrhein-Hofmann, *Monismus und Dualismus in den Völkerrechtslehren* (Duncker & Humblot 2003) 152 ff.

[17] Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (JCB Mohr 1923); Hans Kelsen, *Reine Rechtslehre* (Deuticke 2nd ed 1960) 329; Arangio-Ruiz (n 11) 18, speaking of "the natural unity of human kind … [a]s a matter of pure speculation."

[18] Hans Kelsen, "Der Begriff der Rechtsordnung" (1958) 1 (3) Logique et Analyse 150–167 (150).

[19] Kelsen (n 18) 150.

[20] Kelsen (n 18) 155.

[21] Kelsen (n 18) 161.

[22] Kelsen (n 18) 160.

[23] Kelsen (n 18) 159.

[24] Kelsen (n 18) 159.

This understanding results from Kelsenian adherence to neo-Kantian epistemology, "because it is only this method [the monist concept of law] and its focus on the *manner* of cognizance, not its *objects*, which allows to ascertain *a priori* how positive law is even possible *qua* object of cognizance and *qua* object of the legal science."[25] In Kelsen's own words, "[t]he unity of national law and international law is an epistemological postulate."[26] In a more extensive manner he stated:

> It is . . . true, in the sense of Kant's theory of knowledge, that legal science qua cognition of the law is like all cognition: It is constitutive in character and therefore "creates" its object in so far as it comprehends its object as a meaningful whole. Just as natural science, by means of its ordering cognition, turns the chaos of sensory impressions into a cosmos, that is, into nature as a unified system, so likewise legal science, by means of cognition, turns the multitude of general and individual legal norms issued by legal organs – the material given to legal science – into a unified system free of contradiction, that is, into a legal system.[27]

Moreover, according to him, "[i]t is logically not possible to assume that simultaneously valid norms belong to different, mutually independent systems."[28] Hence, Kelsenian monism is also unthinkable without the Kelsenian quest for purity fueling his pure theory of law. What is appealing about Kelsenian monism is the attempt to understand both international and national law as law with the same conception of law, which allows for a comparison, and a succinct solution to legal norm conflicts. However, it is the quest for purity in the Kelsenian enterprise and the claimed epistemological basis that is understandable considering the historical circumstances under which Kelsen developed his legal theory. Yet it is precisely these elements that expose Kelsenian monism to strong criticism today.

Dualism and monism alike have been heavily criticized. For instance, Armin von Bogdandy holds that "from a scholarly perspective, they are intellectual zombies of another time and should be laid to rest, or

[25] Paul Gragl, "The Pure Theory of Law and Legal Monism – Epistemological Truth and Empirical Plausibility" (2015) 70 (4) Zeitschrift für Öffentliches Recht 665–736 (668–669) [emphasis original; footnotes omitted] with further references.

[26] Hans Kelsen, *General Theory of Law and State* (translated by Anders Wedberg Harvard University Press 1945 [1928]) 373.

[27] Kelsen (n 17) § 16 quoted after (and translated by) Stanley L Paulson, "On the Kelsen–Kant Problematic" in Ernesto Garzón Valdés et al (eds) *Normative Systems in Legal and Moral Theory. Festschrift für Carlos E Alchourrón and Eugenio Bulygin* (Duncker & Humblot 1997) 197–213 (206).

[28] Kelsen (n 26) 363.

'deconstructed.'"[29] Yet monism in particular proves to be a hard-to-kill zombie. Recently, Paul Gragl has advanced a sophisticated account defending Kelsenian – or, as he puts it, legal monism as imagined by the Vienna School of Jurisprudence and the pure theory of law.[30] He defends Viennese legal monism with its "*epistemological* terms of the pure theory of law,"[31] upholds its "descriptive value"[32] and finally even claims its "moral superiority" over other theories on the relationship between legal orders.[33] This deserves further scrutiny, with the goal to deconstruct Kelsenian monism as suggested by Armin von Bogdandy.[34] We will begin by looking at the claim that legal monism as envisaged by the Vienna School of Jurisprudence follows from an epistemological and logical necessity.

1.2.1 *Kantian Epistemology as the Basis for the Pure Theory of Law and Kelsenian Legal Monism*

Gragl correctly points to the Kelsenian claim that his pure theory of law and thus his version of legal monism follow from Kantian or neo-Kantian epistemology.[35] When Immanuel Kant asks "how *subjective conditions of thinking* should have *objective validity*,"[36] Kelsen asks "how to cognize whether a given legal norm is objectively valid or not."[37] We will first revisit

[29] Armin von Bogdandy, "Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law" (2008) 6 (3–4) International Journal of Constitutional Law 397–413 (400).

[30] Gragl (n 16).

[31] Gragl (n 16) ch 3, 8 [emphasis original].

[32] Gragl (n 16) ch 4.

[33] Gragl (n 16) ch 5.

[34] See von Bogdandy (n 29) 400.

[35] Gragl (n 16) 58 n 10, he does so by following the illustration in Michael S Green, "Hans Kelsen and the Logic of Legal Systems" (2003) 54 (2) Alabama Law Review 365–413. For a description of the Kelsenian position see András Jakab, "Kelsens Völkerrechtslehre zwischen Erkenntnistheorie und Politik" (2004) 64 Heidelberg Journal of International Law 1045–1057 with further references. See Danilo Zolo, "Hans Kelsen: International Peace through International Law" (1998) 9 (2) European Journal of International Law 306–324 (323), pointing to the importance of the neo-Kantian philosophy for legal monism as envisaged by Hans Kelsen when Zolo holds that "[o]n the plane of the epistemology of legal knowledge, Kelsen's monistic assumption stands or falls with the neo-Kantian philosophy from which it derives."

[36] Immanuel Kant, *Critique of Pure Reason* (Cambridge edition of the works of Immanuel Kant translated and edited by Paul Guyer and Allen W Wood Cambridge University Press 1998 [*Kritik der reinen Vernunft* (Johann Friedrich Hartknoch 1781/1787)] A 89–90 / B 122 [emphasis original].

[37] Gragl (n 16) 61.

how Gragl portrays Kant, whose undoubtedly important and influential work dates back to the eighteenth century. Second, we will revisit some of the criticism that was advanced against Kant by other important philosophers in order to, third, examine briefly how the philosophical discipline of epistemology has evolved from the eighteenth century until now. Beyond that we will also look at neo-Kantian philosophy, as this philosophy is claimed to be the touchstone of the Kelsenian pure theory of law and legal monism (Section 1.2.2). This will allow us to evaluate whether this is a solid epistemological basis for making the leap to Kelsenian monism and a sound *legal* epistemology today (Section 1.2.3). In other words, after discussing the (neo-)Kantian epistemological basis, we will deal with the question of whether this is a convincing basis for the law, since the analogy between Kelsenian legal epistemology and Kantian epistemology depends on it. The Kantian enterprise asks "how *subjective conditions of thinking* should have *objective validity*" and thereby engages with the relation between (subjective) thinking and the (objective) world. The Kelsenian goal – in contrast – is to find out "how to cognize whether a given legal norm is objectively valid or not" and, thus, is about the validity of norms. Pointedly, the commonality and therefore the justification of such an analogy is the very same letters, "v a l i d," apart from which both endeavors – questions of what is knowledge (of the external world) and questions of what is law or legal knowledge – are worlds apart. Therefore, we should carefully separate validity claims about scientific theories and validity claims pertaining to norms. Before addressing such a critique focused on the appropriateness of this analogy, however, we will begin with Kantian epistemology as portrayed by Gragl.

Kant famously criticized radical rationalism and radical empiricism. In his *Critique of Pure Reason* Kant famously holds that "[t]houghts without content are empty, intuitions without concepts are blind"[38] and points, in the words of Gragl, to the "opaque concept of the transcendental thinking self."[39] This is because only from the union of thoughts and intuitions "can cognition arise."[40] In brief, "whatever a person is thinking, there always is a subject of thought which can never be made an object."[41] Therefore, "the self which thinks cannot be an object of experience"[42] and, "since the unity of the transcendental self is not experienced, its unification of ideas can be regarded

[38] Kant (n 36) A 51 / B 76.
[39] Gragl (n 16) 61, with reference to Kant (n 36) B 131–134.
[40] Kant (n 36) A 51 / B 76.
[41] Gragl (n 16) 61.
[42] Gragl (n 16) 61.

as objectively valid."[43] "Owing to its nature of being a necessary (and hence not being experienced as a contingent) self, the transcendental self can unite all thoughts in a non-contingent manner, and by doing so, it can represent necessary connections in nature."[44] That is – according to Gragl – the basis for Kant's "Copernican" revolution holding "that it is not our knowledge that must conform to objects, but that objects must conform to our knowledge."[45]

First, Gragl deserves praise for having outlined what, "eventually, influenced the pure theory of law, trying to find a way between metaphysical natural law and empiricist sociology or psychology."[46] All too often, we read about dualism and monism without a neat sketch of the theoretical preconditions of these theories. However, having described the preconditions clearly, further questions are provoked. A first intuition might be that, despite the impressive leap accomplished by Kant back in time, the philosophical discipline of epistemology has not stood still since the eighteenth century. Although

[43] To enforce this point, Gragl (n 16) 62 n 40 quotes Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (translated by Kevin C Klement alongside both the Ogden/Ramsey and Pears/McGuinness English translations 2015 [original German Kegan Paul 1922]), available at http://people.umass.edu/klement/tlp/tlp.pdf [last accessed February 1, 2023] para 5.633: "[Y]ou do not see the eye. And nothing in the visual field allows you to infer that it is seen by an eye"; however, this is unfortunate. As Wittgenstein elaborates on solipsism in this passage he is inspired by another critic of Kant, Arthur Schopenhauer, *The World as Will and Representation Vol I* (translated by Judith Norman and Alistair Welchman and edited by Christopher Janaway Cambridge University Press 2010 [*Die Welt als Wille und Vorstellung* 1818]) and Schopenhauer's famous "eternal eye of the world" (*Weltauge*) 308–309; Arthur Schopenhauer, *The World as Will and Representation Vol II* (translated by Judith Norman and Alistair Welchman and edited by Christopher Janaway Cambridge University Press 2018 [*Die Welt als Wille und Vorstellung* 1848]) 3rd book ch 29 "On the Cognition of the Ideas." For the link between the two, see Gottfried Gabriel, *Grundprobleme der Erkenntnistheorie. Von Descartes zu Wittgenstein* (utb 3rd ed 2008) 167. Roughly, according to Schopenhauer, Kant's division into phenomenal (as we perceive it) and noumenal (as it is) collapses into one world, with two aspects, namely will and representation, as the title of Schopenhauer's opus magnum says. For the pessimistic Schopenhauer, contemplation such as aesthetic contemplation of music, might provide a means of escape from the meaningless will. Wittgenstein proposed something similar in this passage 5.631 ff where the empirical subject becomes the object. As a result, solipsism and pure realism collapse. See Schopenhauer (5.64): "Here it can be seen that solipsism, when its implications are followed out strictly, coincides with pure realism. The self of solipsism shrinks to a point without extension, and there remains the reality co-ordinated with it." And 5.641: "Thus there really is a sense in which philosophy can talk about the self in a non-psychological way. What brings the self into philosophy is the fact that 'the world is my world.'"

[44] Gragl (n 16) 62 with reference to Kant (n 36) B 141–142.

[45] Again Gragl (n 16) 62 with reference to Kant (n 36) B xvi and A 369–370 / B 519–521.

[46] Gragl (n 16) 62.

this in itself might not be a sufficient criticism,[47] such skepticism might make us wonder, in general, how to figure out what is state of the art in epistemology today and, in particular, which arguments have been advanced against the Kantian concept of "transcendental idealism." Gragl is aware of Hilary Putnam's criticism of this position as solipsistic.[48] He negates that criticism of Kant, however, by holding that "it is impossible to make such judgments about the thinking self."[49] Rather, Gragl states, the transcendental self "is a *condition for*, not an *object of* knowledge."[50] Before we see how this applies to the law, we need to consult further criticism that has been advanced against this position.

To begin with, a caveat is in order. It is clearly impossible within the framework of this book to outline the theory of knowledge as it stands today. Nor is it possible to take a sophisticated look at Kant's elaborated epistemology. What must suffice for the purpose of this book is to show that Kelsenian *legal* monism, with its heavy reliance on (neo-)Kantian epistemology, does not take into account the critique that has been advanced against Kant in this regard and the development of epistemology in general since 1781 and 1787.[51] This, as we will see, is a major mistake.

[47] See, however, Hanno Sauer, "The End of History" (2022) Inquiry, doi.org/10.1080/0020174X.2022.2124542, for an intriguing argument holding that "studying the history of philosophy is philosophically unhelpful."

[48] Gragl (n 16) 62 with reference to Hilary Putnam, "Why Reason Cannot Be Naturalized" (1982) 52 (1) Synthese 3–23 (10).

[49] Gragl (n 16) 62 with reference to Kant (n 36) B 399–432.

[50] Gragl (n 16) 62, n 47 with reference to Robert C Solomon, *From Rationalism to Existentialism: The Existentialists and Their Nineteenth-Century Backgrounds* (Rowman & Littlefield 2001) 21, who states clearly: "If the world of which we are conscious is necessarily objective and public, it must be the case that all philosophical theories which suppose that the objects in question are nothing other than mere 'ideas' or 'mental entities' are seriously confused. Accordingly, all the versions of 'idealism' which assert such a thesis must be distinguished from what Kant calls his 'transcendental idealism' and rejected as philosophically absurd. For the transcendental idealist (Kant, and, we shall see later, Husserl), the world is not my idea: the world is the phenomenon which must exist independently of my idea of it." This interpretation of Kant, however, is first far from clear from Kant's writing, and second, as we shall see, runs into unsurmountable problems, see below n 90. The same applies to the book review of Strawson which is quoted by Gragl (n 16) 62, 47 as another source, H E Matthews, "Strawson on Transcendental Idealism" (1969) 19 (76) Philosophical Quarterly 204–220 (216–217).

[51] Literally emphasizing great progress in philosophy in the last 200 years in his *philosophical* introduction to a theory of knowledge, see Markus Gabriel, *Die Erkenntnis der Welt – Eine Einführung in die Erkenntnistheorie* (Karl Alber 5th ed 2016); compare also for instance Robert Audit, *Epistemology. A Contemporary Introduction to the Theory of Knowledge* (Routledge 3rd ed 2011) 107, denoting the Kantian position as the "best-known answers . . . and probably the only ones we should call the *classical* answers" to the questions "[h]ow might we understand the justification of our beliefs of self-evident and apparently necessary propositions? And how do we know them?" [emphasis original]. See also Michael Rohlf, "Immanuel Kant"

Yet, to provide sufficient context, we need to understand what drove Kant to write his *Critique of Pure Reason*. According to our intuition, and also for a long time in philosophy, a statement is considered to be true if it describes reality aptly.[52] Conceptions of truth that follow such an account were and still are usually referred to as "correspondence theories of truth" and can be traced back to ancient Greek philosophers. Aristotle, for instance, famously stated that "[t]o say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true."[53] Thomas Aquinas similarly stated that "[t]ruth is the adequation of things and intellect" and thus "[a] judgment is said to be true when it conforms to the external reality."[54] According to this approach, we can consult a "truthmaker" in order to find out whether a statement is true. A truthmaker is anything that makes a statement true.[55] René Descartes, another prominent advocate of the "correspondence theory of truth," pointed out the obviousness of this approach, which is a considerable strength. In fact, Descartes is said to have brought about a Cartesian revolution in philosophy as he famously identified its foundations. According to Dummett, "the Cartesian revolution consisted in giving this role to the theory of knowledge." Descartes asked, "What do we know, and what justifies our claim to this knowledge?"[56] Cartesian doubt was introduced by Descartes as a methodology to question our knowledge as a route to the point of certain knowledge. This led Descartes to question what

in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (January 25, 2016) available at https://plato.stanford.edu/entries/kant/index.html#ref-11 [last accessed February 1, 2023].

[52] Note that talking about true statements is already an intricate issue. According to Marian David, "The Correspondence Theory of Truth" in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (May 28, 2015) available at https://plato.stanford.edu/entries/truth-correspondence/ [last accessed February 1, 2023], "Correspondence theories of truth have been given for beliefs, thoughts, ideas, judgments, statements, assertions, utterances, sentences, and propositions. It has become customary to talk of *truthbearers* whenever one wants to stay neutral between these choices" [emphasis original].

[53] Aristotle, *Metaphysics* book 4 section 1011b25, quoted after David (n 52).

[54] Thomas Aquinas, *Truth* (translated and edited by R W Schmidt, Robert W Mulligan, James V McGlynn Hackett 1994 [*Quaestiones disputatae de Veritate* 1256–1259]), quoted after David (n 52) Q.1, A.1–3. Generally, Bertrand Russell, "On the Nature of Truth and Falsehood" (1906–1907) 7 Proceedings of the Aristotelian Society 28–49; early Wittgenstein (n 43) 2.1 ff, especially 2.222; George E Moore, *Some Main Problems of Philosophy* (MacMillan 1953) ch 15; as well as Alfred Tarski, "The Concept of Truth in Formalized Languages" in *Logic, Semantics, Metamathematics* (Hackett 2nd ed 1983 [1935]) 152–278; and Karl Popper, "Philosophical Comments on Tarski's Theory of Truth" in *Objective Knowledge: An Evolutionary Approach* (Oxford Clarendon Press 2nd ed 1972) 319–340, can be identified – besides many others – as belonging to this group.

[55] David (n 52), which obviously also holds for any other truthbearer.

[56] Michael Dummett, *Frege: Philosophy of Language* (Harper & Row 1973) 666.

makes you certain that you are awake and not dreaming. He answered this in retrospect by stating that "when I distinctly see where things come from and where and when they come to me, and when I can connect my perceptions of them with my whole life without a break then I can be certain that when I encounter these things I am not asleep but awake."[57] Moreover, with his "*cogito ergo sum*" he concluded that at least his own existence was proven precisely by himself "thinking *all* [his] thoughts might be mistaken."[58] In a sense concerning the correspondence theory of truth, Descartes was in good company with such important philosophers as Baruch de Spinoza, John Locke, Gottfried Wilhelm Leibniz, and David Hume[59] and Immanuel Kant,[60] in a way.[61] However, can we linguistically portray something external to linguistics? What does it actually mean that a statement matches reality? Is it not the case that this theory presupposes truth, for if it would not do so, how could we validate our truth claims?

[57] René Descartes, *The Philosophical Writings of Descartes* (edited by John Cottingham, Robert Stoothoff and Dugald Murdoch Cambridge University Press 1984) 2:61 f quoted after Lex Newman, "Descartes' Epistemology" in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (February 15, 2019) available at https://plato.stanford.edu/entries/descartes-epistemology/ [last accessed February 1, 2023], who also provides an overview of various possible interpretations.

[58] For a detailed overview see Newman (n 57) [emphasis original], quoting the entire passage by Descartes (n 57) 2:16 f which reads: "I have convinced myself that there is absolutely nothing in the world, no sky, no earth, no minds, no bodies. Does it now follow that I too do not exist? No: if I convinced myself of something then I certainly existed. But there is a deceiver of supreme power and cunning who is deliberately and constantly deceiving me. In that case I too undoubtedly exist, if he is deceiving me; and let him deceive me as much as he can, he will never bring it about that I am nothing so long as I think that I am something. So after considering everything very thoroughly, I must finally conclude that this proposition, *I am, I exist*, is necessarily true whenever it is put forward by me or conceived in my mind" [emphasis original].

[59] See David Hume, *A Treatise of Human Nature. A Critical Edition Vol 1* (edited by David Fate Norton and Mary J Norton Oxford University Press 2007 [1739–1740]) 295: "Reason is the discovery of truth or falshood. Truth or falshood consists in an agreement or disagreement either to the real relations of ideas, or to real existence and matter of fact." However, Hume adds that "[w]hatever, therefore, is not susceptible of this agreement or disagreement, is incapable of being true or false, and can never be an object of our reason. Now 'tis evident our passions, volitions, and actions, are not susceptible of any such agreement or disagreement; being original facts and realities, compleat in themselves, and implying no reference to other passions, volitions, and actions. 'Tis impossible, therefore, they can be pronounc'd either true or false, and be either contrary or conformable to reason."

[60] See Kant (n 36) A 58 / B 82: "The nominal definition of truth, namely that it is the agreement of cognition with its object, is here granted and presupposed." However, Kant does not hesitate to add "but one demands to know what is the general and certain criterion of the truth of any cognition."

[61] For an overview see David (n 52).

To understand these objections and to relate the Kantian critique to early versions of such an approach we must first consider David Hume, who questioned whether we have direct access to the external world. According to Hume, we can only relate to the external world via our impressions.[62] Hume differentiated between *impressions* (feelings) and *ideas* (thinking) while he held that all ideas are "faint images"[63] – in other words, copies of impressions.[64] Impressions, however, face the problem of induction. According to Hume, we can only explain that we process impressions inductively, but we cannot justify that we do so. In his words, "'[t]is therefore by *experience* only, that we can infer the existence of one object from that of another."[65] So, he goes on, if we remember that when we perceive a flame we have also felt heat, we likely conjugate all past instances of seeing a flame and feeling heat. Hence, "[w]ithout any farther ceremony, we call the one *cause* and the other *effect*, and infer the existence of the one from that of the other."[66] However, this operation is only perceived and remembered by our senses as we make "*constant conjunctions*."[67] He hypothesizes "*that all our reasonings concerning causes and effects are deriv'd from nothing but custom; and that belief is more*

[62] David Hume in turn must actually not be understood as the originator of epistemology. Epistemology as a philosophical discipline with its proper name originating in the seventeenth century. See Jan Woleński, "The History of Epistemology" in Ilkka Niiniluoto, Matti Sintonen and Jan Woleński (eds) *Handbook of Epistemology* (Springer 2004) 3–54. Questions pertaining to the discipline of epistemology, however, have been asked ever since philosophical questions have been asked. See Peter Baumann, *Erkenntnistheorie* (JB Metzler 3rd ed 2015), quoting on the very first page of his introduction an old Chinese story retold by Chuang Tzu, *The Complete Works of Chuang Tzu* (translated by Burton Watson Columbia University Press 1968) 188–189.

[63] Hume (n 59) 7: "All the perceptions of the human mind resolve themselves into two distinct kinds, which I shall call *impressions* and *ideas*. The difference betwixt these consists in the degrees of force and liveliness, with which they strike upon the mind, and make their way into our thought or consciousness. Those perceptions, which enter with most force and violence, we may name impressions; and under this name I comprehend all our sensations, passions and emotions, as they make their first appearance in the soul. By ideas I mean the faint images of these in thinking and reasoning; such as, for instance, are all the perceptions excited by the present discourse, excepting only those which arise from the sight and touch, and excepting the immediate pleasure or uneasiness it may occasion. I believe it will not be very necessary to employ many words in explaining this distinction. Every one of himself will readily perceive the difference betwixt feeling and thinking" [emphasis original].

[64] Hume (n 59) 9: "*that all our simple ideas in their first appearance are deriv'd from simple impressions, which are correspondent to them, and which they exactly represent*" [emphasis original]. Cf 73–74.

[65] Hume (n 59) 61 [emphasis original].

[66] Hume (n 59) 61 [emphasis original].

[67] Hume (n 59) 61 [emphasis original].

properly an act of the sensitive, than of the cogitative part of our natures."[68] This view has been named radical empiricism, for it holds that, ultimately, we cannot access the external world. We are left with the impressions from our senses. In Hume's beautiful prose:

> Reason first appears in possession of the throne, prescribing laws, and imposing maxims, with an absolute sway and authority. Her enemy, therefore, is oblig'd to take shelter under her protection, and by making use of rational arguments to prove the fallaciousness and imbecility of reason, produces, in a manner, a patent under her hand and seal. This patent has at first an authority, proportion'd to the present and immediate authority of reason, from which it is deriv'd. But as it is suppos'd to be contradictory to reason, it gradually diminishes the force of that governing power, and its own at the same time; till at last they both vanish away into nothing, by a regular and just diminution.[69]

It was this powerful finding by Hume that awoke Kant from his self-diagnosed "dogmatic slumber."[70] While, according to Hume, there is no a priori possibility to discover what is out there without our senses and, thus, there is also no a priori causality as a relation between things, Kant famously criticized radical rationalism, but also radical empiricism. In his *Critique of Pure Reason*, Kant

[68] Hume (n 59) 123 [emphasis original].

[69] Hume (n 59) 125. See also David Hume, *An Enquiry Concerning Human Understanding* (edited with an introduction and notes by Peter Millican Oxford University Press 2007 [1748]) 18 ff, esp 19: "I shall venture to affirm, as a general proposition, which admits of no exception, that the knowledge of this relation is not, in any instance, attained by reasonings *a priori*; but arises entirely from experience, when we find, that any particular objects are constantly conjoined with each other. Let an object be presented to a man of ever so strong natural reason and abilities; if that object be entirely new to him, he will not be able, by the most accurate examination of its sensible qualities, to discover any of its causes or effects" [emphasis original].

[70] See Immanuel Kant, *Prolegomena to Any Future Metaphysics That Will Be Able to Come Forward as Science* (translated and edited by Gary Hatfield Cambridge University Press 2nd ed 2004 [*Prolegomena zu einer jeden künftigen Metaphysik, die als Wissenschaft wird auftreten können* 1783]) Preface 10: "I freely admit that the remembrance of *David Hume* was the very thing that many years ago first interrupted my dogmatic slumber and gave a completely different direction to my researches in the field of speculative philosophy" [footnotes omitted; emphasis original]; cf Paul Guyer and Allen W Wood, "Introduction" in Immanuel Kant, *Critique of Pure Reason* (Cambridge edition of the works of Immanuel Kant translated and edited by Paul Guyer and Allen W Wood Cambridge University Press 1998 [*Kritik der reinen Vernunft* (Johann Friedrich Hartknoch 1781/1787)]) 1–80 (23): "it was the recollection of David Hume that many years ago first interrupted my dogmatic slumber and gave an entirely different direction to my investigations in the field of speculative philosophy." Kant was not the only one to be impressed. Also Jeremy Bentham is reported to have said that the writings of David Hume have "caused the scales to fall," see William Edward Morris, "David Hume" in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (April 17, 2019) available at https://plato.stanford.edu/entries/hume/ [last accessed February 1, 2023].

agrees with Hume to a large extent when he states that "[w]hat may be the case with objects in themselves and abstracted from all this receptivity of our sensibility remains entirely unknown to us."[71]

However, Kant, in contrast to Hume, does not think that causality is a relation between things, but an a priori necessary precondition of human beings perceiving things. And, more controversially, that things are also causally constituted. To this end, it is important to note the difference between a priori, which basically means independent of experience, and a posteriori, which means on the basis of experience.[72] Moreover, we can also differentiate between analytical judgments and synthetic judgments. Kant specifies this as follows:

> In all judgments in which the relation of a subject to the predicate is thought (if I consider only affirmative judgments, since the application to negative ones is easy), this relation is possible in two different ways. Either the predicate *B* belongs to the subject *A* as something that is (covertly) contained in this concept *A*; or *B* lies entirely outside the concept *A*, though to be sure it stands in connection with it. In the first case I call the judgment analytic, in the second synthetic.[73]

[71] Kant (n 36) A 42 / B 59. Note, however, that in the previous passage stating that "[w]e have therefore wanted to say that all our intuition is nothing but the representation of appearance; that the things that we intuit are not in themselves what we intuit them to be, nor are their relations so constituted in themselves as they appear to us; and that if we remove our own subject or even only the subjective constitution of the senses in general, then all the constitution, all relations of objects in space and time, indeed space and time themselves would disappear, and as appearances they cannot exist in themselves, but only in us." Kant denies a form of things in themselves except through our appearance. This readily conflicts with Kantian premises as we do not have direct access to things in themselves and, thus, cannot deny or approve their given forms and qualities as they are. See on this M Gabriel (n 51) 262, who insightfully quotes Kleist (Heinrich von Kleist, "An Wilhelmine von Zenge, Berlin, d. 22t März, 1801" [letter to Wilhelmine von Zenge] in Dieter Heimböckel (ed), *Heinrich von Kleist. Sämtliche Briefe* (Reclam 1991) 209–215 (213)), who sums this up by stating that "if all human beings would have green glasses instead of eyes they would consequently have to conclude that all the objects they see through such glasses *are* green. . . . We cannot decide whether what we call truth is truthfully true or whether it only seems to us." In German: "Wenn alle Menschen statt der Augen grüne Gläser hätten, so würden sie urtheilen müssen, die Gegenstände, welche sie dadurch erblicken, *sind* grün – und nie würden sie entscheiden können, ob ihr Auge ihnen die Dinge zeigt, wie sie sind, oder ob es nicht etwas zu ihnen hinzuthut, was nicht ihnen, sondern dem Auge gehört. So ist es mit dem Verstande. Wir können nicht entscheiden, ob das, was wir Wahrheit nennen, wahrhaft Wahrheit ist, oder ob es uns nur so scheint."

[72] Kant (n 36) A 4 / B 8 holds in this regard, for instance, that "Mathematics gives us a splendid example of how far we can go with *a priori* cognition independently of experience" [emphasis original]. See generally G Gabriel (n 43) 48–53.

[73] Kant (n 36) A 6 / B 10.

Analytical judgments, thus, are in a way given to the subject. Synthetic judgments are not contained in the subject but, nevertheless, are related to it.[74] As an example, Kant mentions that "[a]ll bodies are extended" is an analytic judgment, whereas "[a]ll bodies are heavy" is a synthetic judgment.[75] Having made these distinctions, we can principally illustrate the distinction between Hume and Kant. While for both, all analytical judgments are a priori, it is only Kant who considers the possibility of synthetic judgments being a priori.[76] Figuring out how such a priori synthetic judgments are possible is the task of a "transcendental critique."[77] Causality, to return to the example, is considered by both Hume and Kant to be a synthetic judgment. However, the latter also considers causality an a priori judgment. Causality cannot be justified by custom as we could repeatedly ask for the beginning of the cause. Hence, only "because we subject the sequence of the appearances and thus all alteration to the law of causality that experience itself, i.e., empirical cognition of them, is possible."[78] In other words, the law of causality is a precondition for the possibility of representation, and thus it is a transcendental argument, prior to experience.

Furthermore Kant distinguishes mere illusion, the appearance of objects and things in themselves:

> If I say: in space and time intuition represents both outer objects as well as the self-intuition of the mind as each affects our senses, i.e., as it *appears*, that is not to say that these objects would be a mere *illusion* ["*Schein*"]. For in the appearance the objects[, and] indeed even properties that we attribute to them, are always regarded as something really given, only insofar as this property depends only on the kind of intuition of the subject in the relation of the given object to it then this object as *appearance* is to be distinguished

[74] Kant (n 36) A 7 / B 10 also speaks of analytic judgments as "those in which the connection of the predicate is thought through identity" whereas synthetic judgments are "those in which this connection is thought without identity". Kant (n 36) A 7 / B 11 further clarifies: "One could also call the former judgments of clarification and the latter judgments of amplification ('*Erläuterungs-* und *Erweiterungsurteile*'), since through the predicate the former do not add anything to the concept of the subject, but only break it up by means of analysis into its component concepts, which were already thought in it (though confusedly); while the latter, on the contrary, add to the concept of the subject a predicate that was not thought in it at all, and could not have been extracted from it through any analysis."

[75] Kant (n 36) A 7 / B 11. Cf G Gabriel (n 43) 70–73; Robert Hanna, "Kant's Theory of Judgment" in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (October 23, 2017) available at https://plato.stanford.edu/entries/kant-judgment/ [last accessed February 1, 2023].

[76] Kant (n 36) A 9 / B 13.

[77] Kant (n 36) A 11 / B 25, beyond that Kant "call[s] all cognition transcendental that is occupied not so much with objects but rather with our a priori concepts of objects in general."

[78] Kant (n 36) A 189 / B 234.

> from itself as object *in itself*. Thus I do not say that bodies merely *seem* to exist outside me or that my soul only *seems* to be given if I assert that the quality of space and time – in accordance with which, as [a] condition of their existence, I posit both of these – lies in my kind of intuition and not in these objects in themselves.[79]

What is important here is to highlight that Kant – in a way as a response to the challenge of David Hume's skepticism – was eager "to show that a critique of reason by reason itself, unaided and unrestrained by traditional authorities, establishes a secure and consistent basis for both Newtonian science and traditional morality and religion."[80] Hence, it was Kant's goal to show that physics needs to be a priori because the laws of physics apply to all objects without our needing to analyze whether objects actually follow these laws.[81]

The famous dictum of Kant, namely that "[t]houghts without content are empty, [and] intuitions without concepts are blind,"[82] unfolds as follows:

> Our cognition arises from two fundamental sources in the mind, the first of which is the reception of representations (the receptivity of impressions), the second the faculty for cognizing an object by means of these representations (spontaneity of concepts); through the former an object is *given* to us, through the latter it is *thought* in relation to that representation (as a mere determination of the mind). Intuition and concepts therefore constitute the elements of all our cognition, so that neither concepts without intuition corresponding to them in some way nor intuition without concepts can yield a cognition.[83]

Roughly speaking, this brings together content by intuition and form by thought. By the former, Kant provides for the possibility that we assume we see a tree when we actually face a tree. The latter provides grounds for things appearing to human beings in the same way.[84] However, a powerful criticism of this conception was already advanced by Friedrich Heinrich Jacobi in

[79] Kant (n 36) B 69 [emphasis original; German translations in the text, except for Schein, omitted].
[80] Rohlf (n 51); see also in this vein M Gabriel (n 51) 265.
[81] M Gabriel (n 51) 265 highlights the fact that Kant did not think of the possibility of a historically variable a priori in relation to human history and points to Michel Foucault and Richard Rorty for a thesis of a "historic apriori" sharing Kantian premises, albeit without sharing Kantian transcendental idealism.
[82] Kant (n 36) A 51 / B 76.
[83] Kant (n 36) A50 / B 74 [emphasis original].
[84] M Gabriel (n 51) 267.

1787.[85] If causality is restricted to representations, if causality is a necessary precondition for us to cognize objects, then we cannot assume at the same time that things in themselves exist which affect our receptivity, by which they provoke our impressions. Hence, if causality only belongs to the form of our cognition, the content cannot be brought about by causality as well. We lack force to explain that we see a tree because there is a tree. If we solve this puzzle by ascribing causality to the things in themselves, however, we lack a reason for differentiating things in themselves from our perceptions of them. No matter how we turn, the form–content dualism implodes. Kant needs the thing-in-itself in order to explain the content of representations and to assume receptivity at all. Yet, in order to do so, he has to award properties to the thing-in-itself which do not pertain to it from Kantian premises.[86] In Jacobi's words: "I must admit that I was held up not a little by this difficulty in my study of the Kantian philosophy … because I was incessantly going astray on this point, viz. that *without* that presupposition I could not enter into the system, but *with* it I could not stay within it."[87] In order to avoid this criticism, we could turn to a passage in the *Critique of Pure Reason* where Kant seems to retreat to a position labelling the thing-in-itself a mere "boundary concept, in order to limit the pretension of sensibility."[88] More expansively, Kant stated:

> If, therefore, we say: The senses represent objects to us *as they appear*, but the understanding, *as they are*, then the latter is not to be taken in a transcendental but in a merely empirical way, signifying, namely, how they must be represented as objects of experience, in the thoroughgoing connection of appearances, and not how they might be outside of the relation to possible experience and consequently to sense in general, thus as objects of pure

[85] Friedrich Heinrich Jacobi, "Ueber den transscendentalen Idealismus" in *Werke Vol 2* (edited by F Roth and F Köppen 1976 [1787]) 291–310; see also Friedrich Heinrich Jacobi, "David Hume on Faith or Idealism and Realism: A Dialogue" in George di Giovanni (ed) *The Main Philosophical Writings and the Novel Allwill. Friedrich Heinrich Jacobi* (translated with an introductory study, notes, and bibliography by George di Giovanni McGill-Queen's University Press 1994 [1787]) 253–338 (336)). See in this regard M Gabriel (n 51) 268; G Gabriel (n 43) 115. Cf on Jacobi, George di Giovanni and Paolo Livieri, "Friedrich Heinrich Jacobi" in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (December 6, 2018) available at https://plato.stanford.edu/entries/friedrich-jacobi/ [last accessed February 1, 2023].

[86] M Gabriel (n 51) 268–271.

[87] Jacobi (n 85) David Hume on Faith or Idealism and Realism 336 [emphasis original]; in German see Jacobi (n 84) Ueber den transscendentalen Idealismus 304: "Ich muß gestehen, daß dieser Anstand mich bey dem Studio der Kantischen Philosophie nicht wenig aufgehalten hat, … weil ich unaufhörlich darüber irre wurde, daß ich ohne jene Voraussetzungen in das System nicht hineinkomme, und mit jener Voraussetzung darin nicht bleiben konnt."

[88] Kant (n 36) A 255 / B 310–311.

> understanding. For this will always remain unknown to us, so that it even remains unknown to us, so that it even remains unknown whether such a transcendental (extraordinary) cognition is possible at all, at least as one that stands under our customary categories. With us *understanding* and *sensibility* can determine an object *only in combination*. If we separate them, then we have intuitions without concepts, or concepts without intuitions, but in either case representations that we cannot relate to any determinate object.[89]

However, if we accepted this interpretation,[90] it would be difficult to sustain speaking of things in themselves in the plural.[91] Finally, while Kant holds that it is synthesis, a process of the cognizing subject, which provides for order and determination, this is hard to sustain because[92] "[a]ll organizational forms immanent to the transcendental consciousness – or within the genome: the logical position of the problem remains strictly identical in the two cases – cannot provide anything if the 'material' they are to 'form' does not already include in itself the 'minimal form' of being form*able*."[93]

This leads straightforwardly to another very well-known Kantian counterpart. Georg Wilhelm Friedrich Hegel is another important "early" critic of Kant. Hegel criticized Kant – among other things – for his concept of a "thing-in-itself," which is found to exist by Kant even though we cannot perceive it.[94] To Hegel – in close agreement with Jacobi[95] – such a thing-in-itself is a "ghost," for we cannot say anything about it since Kant, by holding that this thing-in-itself exists, construes a causal relationship between the appearances

[89] Kant (n 36) A 258 / B 314 [emphasis original].

[90] See in this regard Rohlf (n 51), pointing to the "two-objects interpretation" and the "two-aspects interpretation" of Kantian "transcendental idealism," of which the former was the standard reading during Kant's time and for a long time after, but which runs into the Jacobian problem referred to here. However, the latter interpretation does not help either as we can constantly ask ourselves whether it is things in themselves or representations of them which affect us. See on this M Gabriel (n 51) 279.

[91] See M Gabriel (n 51) 272–280 for a discussion about possible understandings of Kant's form-content dualism and the differentiation between representation and the thing-in-itself. However, Gabriel concludes that the Kantian form–content dualism implies the flawed assumption that things in themselves are under-determined.

[92] M Gabriel (n 51) 279–280.

[93] Cornelius Castoriadis, "The Logic of Magmas and the Question of Autonomy" in *The Castoriadis Reader* (translated and edited by David A Curtis Oxford University Press 1997) 290–318 (306), points to this when asking "could the living being organize an *absolutely chaotic* world?" Answering in the negative, Castoriadis points to this "old problem of Kantian criticism" and he furthermore adds "[l]et it be noted in passing that the idea of an *absolutely* disordered universe is for us unthinkable" [emphasis original].

[94] However, for ambiguities of the Kantian conception of the thing-in-itself, see for instance nn 90–92 above.

[95] See above n 87.

(*Erscheinungen*) and the thing-in-itself.[96] According to Hegel, the thing-in-itself is "itself only the product of thought,"[97] a "*Gedankending*."[98] Hence, if we think, we are thinking; nothing more and nothing less can be proven by that and thus the thing-in-itself is a product of our thinking and not a thing in the external world.[99] To put it differently, it is impossible to claim something would exist in the external world which, nevertheless, cannot be proven. Even more bluntly, how could I ever find out whether your version of the thing-in-itself looks like mine? For Hegel, our understanding of knowledge has a history – a history of the whole human being that includes its physiological competence, its social environment, as much as its religious, political and philosophical convictions.[100] In Hegel's words, an "aspect of spirit's coming-to-be, *history*, is that *knowing* self-*mediating* coming-to-be – the spirit relinquished into time."[101] In very broad strokes, this is the fundamental difference

[96] Georg Wilhelm Friedrich Hegel, *The Science of Logic* (translated and edited by George di Giovanni Cambridge University Press 2010 [*Wissenschaft der Logik* 1832]) 40–41, 46: "But to want to clarify the nature of cognition prior to science is to demand that it should be discussed outside science, and outside science this cannot be done, at least not in the scientific manner which alone is the issue here."

[97] Hegel (n 96) 41.

[98] Hegel (n 96) 16.

[99] Georg W F Hegel, *Encyclopedia of the Philosophical Sciences in Basic Outline Part I Science of Logic* (translated and edited by Klaus Brinkmann and Daniel O Dahlstrom Cambridge University Press 2010 [*Enzyklopädie der philosophischen Wissenschaften* I 1830]) § 44 and 124, esp § 60: "In every dualistic system, and especially in the Kantian system, its basic flaw reveals itself through the inconsistency of *combining* [*vereinen*] what a moment ago has been declared to be independent and thus *incompatible* [*unvereinbar*]. While what had been combined was just declared to be true, so now instead it is declared to be true that *the two moments*, whose separate existence on their own has been denied to them in the combination which was to be their truth, possess truth and actuality only insofar as they exist in separation. Such philosophizing as this lacks the simple consciousness that in going back and forth in this way, each of these individual determinations is declared to be unsatisfactory, and the flaw consists in the simple inability to bring together two thoughts (and in point of form there are only two of them present). It is therefore the greatest inconsistency to admit, on the one hand, that understanding acquires knowledge of appearances only while maintaining, on the other, that this kind of knowledge is something *absolute* by saying that knowing *cannot* go further, that this is the *natural*, absolute *barrier* [*Schranke*] for human knowledge [*Wissen*]. Natural things are limited [*beschränkt*], and they are merely natural things, insofar as they *know* [*wissen*] nothing of their universal barrier, insofar as their determinacy is a barrier only *for us*, not *for them*. Something can be known [*gewußt*], even felt to be a *barrier*, a lack only insofar as one has at the same time *gone beyond* it" [emphasis original].

[100] See M Gabriel (n 51) 281 with further reference to Georg Wilhelm Friedrich Hegel, *Glauben und Wissen oder Reflexionsphilosophie der Subjektivität in der Vollständigkeit ihrer Formen als Kantische, Jacobische und Fichtesche Philosophie* (1803); Georg Wilhelm Friedrich Hegel, *Die Differenz des Fichteschen und Schellingschen Systems der Philosophie* (1801).

[101] Georg Wilhelm Friedrich Hegel, *The Phenomenology of Spirit* (translation by Terry Pinkard Cambridge University Press 2018 from *Phenomenologie des Geistes* 1807) 466 [emphasis original].

between Kantian "subjective idealism" and Hegelian "objective idealism."[102] Hence, our thinking not only captures subjective constructions, or crude empirical facts, but follows the objective structure of being. In Hegel's own words, introducing the *spirit*: "The *I* that is *we* and the *we* that is *I*."[103] It is this switch, departing from a Kantian "I think," that could be called "methodological solipsism," finally arriving at a "We think." This Hegelian unity claims that "analytical unity" can only exist in "synthetic unity."[104] Thinking presupposes complex conceptual faculties that can only be acquired in a community. The existence of a subjective spirit presupposes an objective spirit. And, thus, philosophy as much as epistemology has to dismiss "methodological solipsism."[105]

This is still the very beginning of the nineteenth century. Hence, the "linguistic turn" in philosophy is still to come. Writ large, we can say that whereas Kant aimed at a criticism of pure reason and rational assumptions when thinking about what we can know, after the linguistic turn, the transcendental criticism turned to a critique of language.[106] This so-called linguistic turn in philosophy, brought about, among others, by Ludwig Wittgenstein, further challenges metaphysical assumptions and is thus also of relevance here.[107] Wittgenstein makes the argument – as did Hegel – that it is a

[102] See Vittorio Hösle, *Die Krise der Gegenwart und die Verantwortung der Philosophie. Transzendentalpragmatik, Letztbegründung, Ethik* (C H Beck 3rd ed 1997) 205–208, for an evolutionary classification into "realism/naturalism," "subjective idealism" and "objective idealism," and his own goal of an intersubjective transformation of objective idealism informed by transcendental pragmatism.

[103] Hegel (n 101) 108 [emphasis original]. Cf Terry Pinkard, *Hegel's Phenomenology. The Sociality of Reason* (Cambridge University Press 1994) and the qualification of "sociality of reason" in the subtitle.

[104] M Gabriel (n 51) 249.

[105] See on this issue see Markus Gabriel, *An den Grenzen der Erkenntnistheorie. Die notwendige Endlichkeit des objektiven Wissens als Lektion des Skeptizismus* (Karl Alber 2nd ed 2014) § 10, esp 286, who even goes so far as to claim that not only without a community would we lack truthful convictions, but also without dissent. In this sense Gabriel (286, n 141) quotes David Macarthur, "Naturalism and Skepticism" in Mario De Caro and David Macarthur (eds) *Naturalism in Question* (Harvard University Press 2004) 106–124 (122): "To believe involves a commitment to its being the case that one's truth-taking is regulated by what is in fact true. What performs this regulative function is the answerability of belief to rational criticism. Of course, we sometimes accept something on faith, without any evidence or reasons. But our entitlement to think of any given belief as true, including a belief accepted on faith, depends on its being answerable to rational criticism should we acquire sufficient reason or evidence to suggest it may be false." See also M Gabriel (n 51) 249, where he argues in a similar vein.

[106] See G Gabriel (n 43) 129–130, speaking of a transformation from epistemology to the philosophy of language.

[107] Among others it was Wittgenstein (n 43) who was responsible for the "linguistic turn." While the notion goes back to Gustav Bergmann, *Logic and Reality* (University of Wisconsin Press

contradiction to speak about limits of our knowledge (*Erkenntnis*) because by knowing the limits one has to have transcended the limit already. Without a point of reference external to our knowledge (*Erkenntnis*) (via our senses, experience or consciousness), we do not have a reason to question the limitlessness of our thinking about objects. In Wittgenstein's famous saying:

> *The limits of my language* mean the limits of my world.
>
> Logic fills the world: the limits of the world are also its limits. We cannot therefore say in logic: This and this there is in the world, that there is not. For that would apparently presuppose that we exclude certain possibilities, and this cannot be the case since otherwise logic must get outside the limits of the world: that is, if it could consider these limits from the other side also. What we cannot think, that we cannot think: we cannot therefore say what we cannot think.
>
> This remark provides a key to the question, to what extent solipsism is a truth. In fact what solipsism *means*, is quite correct, only it cannot be *said*, but it shows itself. That the world is *my* world, shows itself in the fact that the limits of the language (*the* language which I understand) mean the limits of *my* world.
>
> The world and life are one.[108]

Without entering into all the intricacies of Wittgensteinian philosophy in particular,[109] and the linguistic turn and the "birth" of analytic philosophy in general,[110] it is nevertheless important for us to understand that a

1964) 177, as evinced by Richard Rorty, "Introduction" in Richard Rorty (ed) *The Linguistic Turn: Essays in Philosophical Method. With Two Retrospective Essays* (University of Chicago Press 1967 reprinted in 1992) 1–39 (9); see also Peter M S Hacker, "The Linguistic Turn in Analytical Philosophy" in Michael Beaney (ed) *The Oxford Handbook of the History of Analytic Philosophy* (Oxford University Press 2013) 926–947 (926), specifying this to Gustav Bergmann, "Strawson's Ontology" (1960) 57 (19) Journal of Philosophy 601–622. Dummett (n 56) 665 ff traces back the origins of the linguistic turn to the work of Gottlob Frege, *The Foundations of Arithmetic. A Logico-Mathematical Enquiry into the Concept of Number* (translated by J L Austin Harper 2nd ed 1953 [*Die Grundlagen der Arithmetik. Eine logisch mathematische Untersuchung über den Begriff der Zahl* Wilhelm Koebner 1884]). For – according to Dummett (n 56) 665–666 – Frege "achieved a revolution as overwhelming as that of Descartes." To Dummett (n 56) 666, "Frege's primary significance consists precisely in the fact that he made this area of philosophy [philosophy of logic] not a specialized branch, but the starting-point for the whole subject." See, however, for a critical assessment of this qualification, Joan Weiner, "Frege and the Linguistic Turn" (1997) 25 (2) Philosophical Topics 265–288.

[108] Wittgenstein (n 43) 5.6–5.621 [emphasis original].

[109] On Wittgenstein and the development in his philosophy see for instance Joachim Schulte, *Wittgenstein. Eine Einführung* (Reclam 2nd ed 2016).

[110] See Michael Dummett, *Origins of Analytical Philosophy* (Harvard University Press 1993) 5, pointing again to "Frege's *Die Grundlagen der Arithmetik*[2] of 1884." Dummett continues by

fundamental skepticism relating to things a priori goes hand in hand with this development. While it can, in a way, be described as a transformation from epistemology to the philosophy of science, it is common ground shared by proponents of logical empiricism, such as Moritz Schlick and Rudolf Carnap, and their adversaries from critical rationalism, such as Karl Raimund Popper, that natural laws are not valid a priori.[111] While the advocates of logical empiricism aim to avoid metaphysics altogether for the sake of science, advocates of critical rationalism accepted metaphysics as being of heuristic value for science.[112] Beyond that, Popper and Carnap alike deny the possibility of a priori synthetic judgments.[113]

Interestingly, however, Wittgenstein famously ends his *Tractatus* with the metaphor of a ladder. "[A]nyone who understands" him, Wittgenstein says, "recognizes" his propositions "as nonsensical, when he has used them – as steps to climb up beyond them."[114] He then suggests that the reader "throw away the ladder" after having "climbed up it"; his propositions must be transcended to "see the world alright."[115] For "[w]hat we cannot speak about we must pass over in silence."[116] Thus, again, we are left with a clear warning against metaphysical claims a priori. This, I think, is fair to conclude from this finding.[117] While this was not the end of philosophy of science and even

saying that "[a]t a crucial point in the book, Frege raises the Kantian question, 'How are numbers given to us, granted that we have no idea or intuition of them?' His answer," so he goes on, "depends upon the celebrated context principle, which he had laid down in the Introduction as one of the fundamental methodological principles to be followed in the book."

[111] G Gabriel (n 43) 138.

[112] G Gabriel (n 43) 142.

[113] G Gabriel (n 43) 143.

[114] Wittgenstein (n 43) 6.54.

[115] Wittgenstein (n 43) 6.54.

[116] Wittgenstein (n 43) 7.

[117] However, Wittgenstein's take in the Tractatus that (logical) language can accurately depict facts in the world as assumed by logical atomism (Bertrand Russell, *The Philosophy of Logical Atomism* (Routledge 2010 [Fontana 1972]) sec 1, can also be criticized as an implicit assumption that needs to be justified. See for a discussion G Gabriel (n 43) 151–159. For criticism of logical atomism, see for instance John Henry McDowell, *Having the World in View. Essays on Kant, Hegel, and Sellars* (Harvard University Press 2009) 6, who writes, in examining Wilfrid Sellars', *Empiricism and the Philosophy of Mind* (Harvard University Press 2nd ed 1997) part III: "In an empiricistic foundationalism of the usual kind, it is not just that the credentials of all knowledge are ultimately grounded in knowledge acquired in perception. Beyond that, the grounding perceptual knowledge is atomistically conceived. Traditional empiricists take it that each element of the grounding knowledge can in principle be acquired on its own, independently not only of other elements of the grounding perceptual knowledge, but also of anything in the world view that is grounded on this basic stratum of knowledge."

Wittgenstein himself seemed to have continued climbing,[118] one message appears to be rather clear-cut. Metaphysical assumptions are a daring venture and if we are to advance something of this sort, utmost prudence and reluctance seems to be in order, and a proper justification for any assumption we consider necessary is indispensable and yet must be regarded with suspicion. What is more, since Kant famously pointed to the need for critical metaphysics, science has made huge advancements, which at least suggest that what Kant tried to establish as granted a priori cannot be defended as given.

In this vein, the criticism advanced by Charles Sanders Peirce is pertinent as he states that he "cannot admit the proposition of Kant – that there are certain impassable bounds to human knowledge."[119] This seemed wrong to Peirce because "[t]he history of science affords illustrations enough of the folly of saying that this, that, or the other can never be found out."[120] Yet, despite this critique, the so-called founder of pragmatism was an admirer of Kant and indeed can be labeled as a defender of objective idealism despite his pragmatism.[121]

Being aware of the pragmatist approach of Peirce, Karl-Otto Apel developed transcendental pragmatism (*Transzendentalpragmatik*)[122] and Jürgen Habermas universal pragmatics (*Universalpragmatik*).[123] The former analyzes

[118] See, for instance, his later work: Ludwig Wittgenstein, *Philosophical Investigations* (translated by G E M Anscombe Basil Blackwell 2nd ed 1958 reprinted 1986 [*Philosophische Untersuchungen* 1953]); Ludwig Wittgenstein, *On Certainty* (translated by G E M Anscombe and Denis Paul and edited by G E M Anscombe and G H von Wright Harper 1972 [*Über Gewißheit* 1969]). Yet Wittgenstein's work is hotly debated and this is certainly not the place to offer yet another interpretation, except for pointing to the notable difference to his earlier work.

[119] Charles Sanders Peirce, "Science Immortality" in Charles Hartshorne and Paul Weiss (eds) *Charles Sanders Peirce. Collected Papers Vol VI: Scientific Metaphysics* (Harvard University Press 1935) sec 6.556.

[120] Peirce (n 119) sec 6.556.

[121] For a synopsis see Susan Haack, "The Legitimacy of Metaphysics: Kant's Legacy to Peirce, and Peirce's to Philosophy Today" (2008) 36 (1) Philosophical Topics 97–100 (109): "In briefest summary, then: (part of) Kant's legacy to Peirce was a lasting conviction that metaphysics does not have to be the hopelessly 'airy science' Hume had pooh-poohed, but could and should become a legitimate and valuable area of investigation; and (part of) Peirce's legacy to philosophy today is a distinctively plausible post-Kantian reconception of how this might be achieved."

[122] Karl-Otto Apel, *Understanding and Explanation: A Transcendental-Pragmatic Perspective* (translated by Georgia Warnke MIT Press 1984 [*Die Erklären-Verstehen-Kontroverse in Transzendental-Pragmatischer Sicht* Suhrkamp 1979]).

[123] Jürgen Habermas, "What Is Universal Pragmatics?" in *On the Pragmatics of Communication* (ed Maeve Cooke MIT press 1976 ["Was heißt Universalpragmatik?" in Karl-Otto Apel (ed) *Sprachpragmatik und Philosophie* Suhrkamp (1976) 174–272]) 21–103; Jürgen Habermas, *Communication and the Evolution of Society* (Beacon Press 1979); see also Jürgen Habermas,

transcendental – that is, enabling – conditions for human action. The latter, also called "formal pragmatics" by Habermas when he first wrote about it, is conceptualized as "reconstructive science." The point is to "render theoretically explicit the intuitive, pretheoretical know-how underlying such basic human competences as speaking and understanding, judging and acting."[124] Importantly, and "[u]nlike Kant's transcendental analysis of the conditions of rationality, reconstructive sciences yield knowledge that is not necessary but hypothetical, not a priori but empirical, not certain but fallible."[125] By closely focusing on language and conceptualizing "reconstructive science," Habermas departs in important ways from Kant, which is also relevant to us. For Habermas, philosophy is no longer "the sole judge in normative matters." What is more, nor is philosophy "the methodological authority that assigns the various domains of inquiry to their proper questions." In contrast, according to the approach advanced by Habermas, "philosophy must engage in a fully cooperative relationship with the social sciences and the empirical disciplines in general."[126] "Once we have dropped foundationalist claims, we can no longer expect a hierarchy of sciences."[127] Beyond that, Jürgen Habermas, among others, has also developed a consensus theory of truth.[128] According

The Theory of Communicative Action. Lifeworld and System: A Critique of Functionalist Reason Vol 2 (translated by Thomas McCarthy Polity Press 1987 [*Theorie des kommunikativen Handelns Band 2: Zur Kritik der funktionalistischen Vernunft* Suhrkamp 3rd ed 1985]) 400–404, explaining that universal pragmatics provides for a "non-foundational universalism" for a social and political theory. See, however, for the criticism, that despite not being a representational foundationalism in the sense of Richard Rorty (*Philosophy and the Mirror of Nature* (Princeton University Press 1979)), Habermasian universal pragmatics are nonetheless a "non-representation foundationalism" although not resting on a "representational epistemology" (ie correspondence theory of truth), Hudson Meadwell, "The Foundations of Habermas's Universal Pragmatics" (1994) 23 (5) Theory and Society 711–727.

[124] James Bohman and William Rehg, "Jürgen Habermas" in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (August 4, 2014) available at https://plato.stanford.edu/entries/habermas/ [last accessed February 1, 2023]; Habermas (n 123) *The Theory of Communicative Action. Lifeworld and System: A Critique of Functionalist Reason Vol 2* ch 1.

[125] Bohman and Rehg (n 124).

[126] Bohman and Rehg (n 124).

[127] Habermas (n 123) *The Theory of Communicative Action. Lifeworld and System: A Critique of Functionalist Reason Vol 2* 400.

[128] See Jürgen Habermas, "Wahrheitstheorien" in Helmut Fahrenbach (ed) *Wirklichkeit und Reflexion. Walter Schulz zum 60. Geburtstag* (Neske 1973) 211–265; Jürgen Habermas, *Truth and Justification* (translated by Barbara Fultner MIT Press 2003 [*Wahrheit und Rechtfertigung. Philosophische Aufsätze* Suhrkamp 1999]). For early criticism see Ansgar Beckermann, "Die realistischen Voraussetzungen der Konsenstheorie von J. Habermas" (1972) 3 (1) Zeitschrift für allgemeine Wissenschaftstheorie 63–80. Cf, for criticism, Nicholas Rescher, *Pluralism: Against the Demand for Consensus* (Oxford Clarendon Press 1993); for criticism of this criticism, see Seamus O'Neill, "Book Review: Nicholas Rescher, Pluralism: Against the

to this view, truth is what can be claimed in a noncoercive general and justified consensus. For participants in a rational discourse, we have to assume pragmatic prerequisites, which are a sort of aspiration; in Habermas' words they are "an unavoidable supposition, reciprocally made in discourse."[129]

A pragmatic theory of truth, in turn, does not accept the consensus theory of truth and takes practical life – instead of consensus – as a yardstick. According to this view, a proposition is true if its consequence helps solve a practical problem or answer a question related to such a problem.[130] As has been spelled out before, this cannot be brought in line with the Kantian assumptions as borrowed by the Kelsenian pure theory of law either. Yet this approach too faces criticism that because something is useful does not mean it must be true. False facts, as is proven over and over again, can be very useful. This, however, does not render lies true.

The coherence theory of truth is another major competitor in the question of what is truth.[131] According to this conception, a proposition is compared to an already established system. Hence, to figure out whether a proposition is true, we need to evaluate whether this proposition can be included in a system without contradiction – in other words, whether this proposition is coherent with the system. This, however, is likely circular or necessitates a preestablished system. Beyond that, coherence is quite a weak criterion for truth. However, importantly for our purpose, it does not support the Kelsenian pure

Demand for Consensus" (1995) 7 (2) Utilitas 340–343. However, see also Jürgen Hagermas, "Kommunikatives Handeln und detranszendentalisierte Vernunft" in *Zwischen Naturalismus und Religion. Philosophische Aufsätze* (Suhrkamp 2005) 27–83; and Jürgen Habermas, "Zur Architektonik Der Diskursdifferenzierung Kleine Replik auf eine groβe Auseinandersetzung" in *Zwischen Naturalismus und Religion. Philosophische Aufsätze* (Suhrkamp 2005) 84–105.

[129] Habermas (n 128) Wahrheitstheorien 258, quoted in Thomas McCarthy, *The Critical Theory of Juergen Habermas* (MIT Press 1978) 310.

[130] Charles Sanders Peirce, "Truth and Falsity and Error" in James Mark Baldwin (ed) *Dictionary of Philosophy and Psychology Vol 2* (1901) 716–720 (718–720); see also William James, *The Meaning of Truth: A Sequel to "Pragmatism"* in *Pragmatism and The Meaning of Truth* (edited with an introduction by Alfred J Ayer Harvard University Press 1978 [1909]); William James, "Pragmatism's Conception of Truth" in Michael P Lynch (ed) *The Nature of Truth. Classic and Contemporary Perspectives* (MIT Press 2001 [1907]) 211–228. See also John Dewey and Arthur Bentley, *Knowing and the Known* (Beacon Press 1949). For an overview, see John Capps, "The Pragmatic Theory of Truth" in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (March 21, 2019) available at https://plato.stanford.edu/entries/truth-pragmatic/ [last accessed February 1, 2023].

[131] Nicholas Rescher, *The Coherence Theory of Truth* (Oxford University Press 1973); cf James O Young, "The Coherence Theory of Truth" in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (June 26, 2018) available at https://plato.stanford.edu/entries/truth-coherence/ [last accessed February 1, 2023].

theory of law as it does not help restore what has been lost through the critique of the Kantian assumptions of the Kelsenian project.

Finally, in contemporary epistemology it is important to note Donald Davidson, who also argues that thought hinges on language.[132] Yet, according to his deflationary theory of truth, the term truth does not denote a real property of sentences or propositions. To him, it is a "folly" to try to define truth,[133] for it is precisely the point of this theory of truth to prove the irrelevance of its subject matter.[134]

Obviously, this was a strikingly brief overview lacking many important details. However, to return to the reason why we started engaging with epistemology and theories of truth, I think it should have become clear by now that Kantian epistemology, despite its genius, is not a stable foundation for legal epistemology. It is not up to date and has been heavily criticized, and rightly so. Therefore, it is no firm basis for a theory on the relationship between legal orders. For a proper legal epistemology, we cannot but consider the philosophical progress achieved since the eighteenth century.[135] Nevertheless – leaving the criticism just expressed to one side – we will now take a look at some neo-Kantian defense against criticisms aimed at Kant in particular and neo-Kantian philosophy in general. We will do so in order to determine whether the leap from Kantian to neo-Kantian epistemology can provide fruitful grounds for the axioms of the pure theory of law and Kelsenian legal epistemology, which is the basis for Kelsenian legal monism.

[132] See, for example, Donald Davidson, *Inquiries into Truth and Interpretation* (Oxford University Press 1984); cf Donald Davidson, "The Centrality of Truth" in Jaroslav Peregrin (ed) *Truth and Its Nature (if Any)* (Springer 1999) 105–115.

[133] Donald Davidson, "The Folly of Trying to Define Truth" in Michael P Lynch (ed) *The Nature of Truth. Classic and Contemporary Perspectives* (MIT Press 2001) 623–640. See, however, Paul Horwich, "A Defense of Minimalism" in Michael P Lynch (ed) *The Nature of Truth. Classic and Contemporary Perspectives* (MIT Press 2001) 559–578.

[134] See also Ralf Poscher, "Wahrheit und Recht. Die Wahrheitsfragen des Rechts im Lichte der deflationären Wahrheitstheorie" (2003) 89 (2) Archiv für Rechts- und Sozialphilosophie 200–215, who refers to the deflationary theory of truth and in doing so adapts the argument from Paul Horwich holding that the precise point of this theory of truth is to prove the irrelevance of its subject matter for the *law*. For an overview of truth theories and the law, compare Martina Deckert, "Recht und Wahrheit. Zum gegenwärtigen Stand der Diskussion" (1996) 82 (1) Archiv für Rechts- und Sozialphilosophie 43–54; see also Annette Brockmöller, Stephan Kirste and Ulfrid Neumann (eds) *Wert und Wahrheit in der Rechtswissenschaft* ARSP Beiheft 145 (2015).

[135] For a general overview, see Isaak I Doore, *The Epistemological Foundations of Law* (Carolina Academic Press 2007).

1.2.2 Neo-Kantianism and Its Conception of Epistemology

"It seems to be obvious that great ideas and insights inevitably become dogmatized."[136] Kant developed his *Critique of Pure Reason* and the arguments expressed therein to enable scientific metaphysics. In his *Metaphysics of Morals* generally and in his *Doctrine of Right* in particular, for instance, Kant did not return to his epistemology in the sense that the Kelsenian pure theory of law does concerning the law.[137] What Kant considered as synthetic a priori judgments on epistemology in general – causality, for instance – is quite different from legal validity. Kelsen, however, simply adopted what he labeled a (neo-)Kantian position with regard to the law. So what Kant considered necessary concerning the cognition of the external world and how we perceive nature, Kelsen postulates – without giving reasons for this intriguing analogy – would apply to the regulation of human behavior as well.[138] Before elaborating on this claim and the problems arising with such an alliance, we will first analyze relevant neo-Kantian positions.

Kantian philosophy was immensely influential and, alongside the criticism partly outlined earlier, some scholars – today commonly referred to as neo-Kantians – answered criticisms of Kant and became well-known for their philosophical battle cry "back to Kant!"[139] Again, a caveat is in order.

[136] Rainer Stollmann, *Groteske Aufklärung. Studien zu Natur und Kultur des Lachens* (M & P 1997) 44. Stollmann further continues this statement by adding that knowledge is power and thus, also victim of misuse of power [translation in the text LK].

[137] See Immanuel Kant, *Metaphysics of Morals: Doctrine of Virtue Vol I* and *Doctrine of Right Vol II* (edited and translated by Mary J Gregor Cambridge University Press 1997 [*Die Metaphysik der Sitten: Tugendlehre und Rechtslehre* 1797]); on this see for example Karl Ameriks and Otfried Höffe (eds) *Kant's Moral and Legal Philosophy* (Cambridge University Press 2009). Interestingly, this is noted by Kelsen, who was quite clear that Kant "can be regarded as the most nearly perfect expression of classical natural law theory as it developed out of Protestant Christianity during the seventeenth and eighteenth centuries." See also Stanley L Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law" (1992) 12 (3) Oxford Journal of Legal Studies 311–332 (322, n 39), quoting Hans Kelsen, *Philosophical Foundations of Natural Law Theory and Legal Positivism* (translated by Wolfgang H Kraus as an appendix to Kelsen, *General Theory of Law and State*, translated by Anders Wedberg Harvard University Press 1945 [1928]) 389–445, esp 444–445. Other Kelsenians also hold that "Kelsen's Kant was the Kant of epistemology in the *Critique of Pure Reason*, and not the Kant of moral philosophy in the *Metaphysics of Morals* and the *Critique of Practical Reason*." See Gragl (n 16) 64–65 with further reference to Paulson (n 27) 198.

[138] See the early criticism expressed by Erich Voegelin, *Der autoritäre Staat. Ein Versuch über das österreichische Staatsproblem* (Springer 1997 [1936]) 105–106, 108.

[139] See Christian Krijnen, "'Back to Kant': Neo-Kantianism" in Gary Banham, Dennis Schulting and Nigel Hems (eds) *The Bloomsbury Companion to Kant* (Bloomsbury 2nd ed 2015) 318–324 (320, n 112), who explains that the dictum "back to Kant" was first expressed by Otto Liebmann, *Kant und die Epigonen* (1865) when he "wrote at the end of each chapter: 'Hence,

As neo-Kantianism is better classified as a rather loose philosophical movement than a specific school of thought, it is impossible to outline all positions and arguments attributed to this label.[140] Hence, we will again only refer to those arguments that are related to Kelsenian legal epistemology. In this vein, the neo-Kantianism from Marburg, most prominently represented by Hermann Cohen, is of interest to us.[141] The neo-Kantianism that was located in Baden around Wilhelm Windelband will therefore be left aside here. Yet doubts about the Kelsenian interpretation of Kant might already be supported because he chose not to align with those neo-Kantians who focused on the humanities, namely those located in Baden. Their value-laden approach was actually quite far from what Kelsen was aiming at. This is not in itself a strong argument against the Kelsenian interpretation of Kant. However, it is still interesting that Kelsen claimed to follow those neo-Kantians who were not so much interested in the humanities as in physics and mathematics.[142]

Neo-Kantians did not follow Kantian positions blindly but deviated from Kant in some important respects. This is significant as changes introduced to or criticism expressed of Kantian conceptions by his successors have to be

we must return to Kant [*Also muß auf Kant zurückgegangen werden*]'" [emphasis original]. For a historical overview of the movement, see Thomas A Willey, *Back to Kant. The Revival of Kantianism in German Social and Historical Thought 1860–1914* (Wayne State University Press 1978).

[140] For a general overview, see Jeremy Heis, "Neo-Kantianism" in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (May 18, 2018) available at https://plato.stanford.edu/entries/neo-kantianism/index.html#ref-11 [last accessed February 1, 2023]; for an overview with particular emphasis on the origins and evolution of neo-Kantianism, see Klaus Christian Köhnke, *Entstehung und Aufstieg des Neukantianismus. Die deutsche Universitätsphilosophie zwischen Idealismus und Positivismus* (Suhrkamp 1993).

[141] For an introduction see Sebastian Luft, "Introduction: Hermann Cohen (1842–1918)" in Sebastian Luft (ed) *The Neo-Kantian Reader* (Routledge 2015) 93–100, 107–116. Cf especially Hermann Cohen, *Kants Theorie der Erfahrung* (Dümmler 2nd ed 1885 [partially translated by David Hyder as "'The Synthetic Principles' from Kant's Theory of Experience (1885)" in Sebastian Luft (ed) *The Neo-Kantian Reader* (Routledge 2015) 107–116]); Hermann Cohen, *Logik der reinen Erkenntnis* (Georg Olms Hermann Cohen Werke Vol 6 I 4th ed 1977 [Bruno Cassirer 2nd ed 1914]); Hermann Cohen, *System der Philosophie, Zweiter Teil: Ethik des reinen Willens* (Georg Olms Hermann Cohen Werke Vol 7 II 5th ed 1981 [Bruno Cassirer 2nd ed 1907]).

[142] See Fritz-Joachim von Rintelen, "Philosophical Idealism in Germany: The Way from Kant to Hegel and the Present" (1977) 38 Philosophy and Phenomenological Research 1–32 (24); see also Heis (n 140): "Typically (not exclusively), the Marburg philosophers were concerned with the physics and mathematics of the late nineteenth and early twentieth century, which (they emphasized) differed fundamentally from that of Kant's own day. The Southwest Neo-Kantians, on the other hand, were more concerned with the so-called '*Geisteswissenschaften*' (the 'human sciences'), which had come into their own in the nineteenth century and now deserved (they argued) to be recognized as autonomous and fully scientific" [emphasis original].

followed closely when claiming to adopt either a Kantian or a neo-Kantian approach. To put it bluntly, cherry-picking has to be treated with caution. For Marburg neo-Kantians, for instance, things in themselves were a postulation and the distinction between sensibility and understanding was rejected too.[143]

[143] Heis (n 140); on the rejection or reinterpretation of the things in themselves, see Cohen (n 141) *Kants Theorie der Erfahrung* 503 ff; on the rejection of the distinction between sensibility and understanding, see Cohen (n 141) *Logik der reinen Erkenntnis* ch VII; see also Paul Natorp, "'Kant and the Marburg School' (1912)" in Sebastian Luft (ed) *The Neo-Kantian Reader* (translated by Frances Bottenberg Routledge 2015 ["Kant und die Marburger Schule" (1912) 17 Kant-Studien 193–221]) 180–197 (186): "In the end, 'intuition' no longer remains a cognitive factor which stands across from or is opposed to thinking. It *is* thinking, just not thinking in terms of laws, but thinking in terms of full objects. In its implementation, in its exercise, intuition is to conceptual thought as function is to the law of function. This requires that every one of its states be strictly and unambiguously determined, but they must be determined in respect to the lawful functions of thinking itself: particularity, quantity, quality and causal reciprocality must be determined according to their respective laws. The result is something which *is* 'given' for the first time, but which seemed to *be* given as a fixed sum. This makes quite transparent the following oddly illuminating sentence (which appears in the section concerning the highest principle of synthetic judgments): 'To give an object, if this is not again meant only mediately, but it is rather to be exhibited immediately in intuition, is nothing other than to relate its representation to experience (whether this be actual or still possible)' [Kant (n 36) A 156 / B 195]. Kant is only now in a position to prove the 'possibility' of experience within a system of grounding principles. Givenness has transformed itself into a *postulate* of reality; it adopts purely modal meaning." Importantly, Natorp continues: "This is pure idealism and nothing else. To neither consider nor straightforwardly carry out this radical correction, which at its core is a self-correction already contained in Kant, would entail giving up the most profound dimension of the critique of reason, only for the sake of saving, at any cost, the long-disproven, stale provisions of the Transcendental Aesthetic contained in the inaugural dissertation of 1770 (an at least partially if not wholly dogmatic account)" [footnotes omitted; emphasis original]. Cf Wilhelm Windelband, "Philosophy of Culture and Transcendental Idealism' (1910)" in Sebastian Luft (ed) *The Neo-Kantian Reader* (translated by Alan Duncan Routledge 2015 ["Kulturphilosophie und transzendentaler Idealismus" in Wilhelm Windelband, *Präludien. Aufsätze und Reden zur Philosophie und ihrer Geschichte* Vol II (Mohr 5th ed 1915) 279–294] 317–324 (323): "transcendental idealism has no more need of 'another world,' as Kant originally would have deemed necessary in the concept of the 'thing in itself'; after all, he himself made us at home in this world afterwards through practical reason, and thus tore down the boundary." However, Windelband continues by highlighting that "one thing must be stressed again and again against intentional and unintentional misunderstandings of this doctrine: that the individual must never think of itself as the creative power in the creation of objects; we are involved, inasmuch as genuine cultural values are concerned, never as individuals, nor even as instances of our genus, but act rather as domiciles and hosts of transcendent functions of reason, and therefore functions factually grounded in the essence of things themselves. Only these functions of reason determine the 'objects' that are necessarily and universally valid. This participation in a larger world of rational values that nevertheless make up the sense of all the orders upon which our little worlds of knowledge, will and formation are built up, this insertion of our conscious life of culture into rational orders that far transcend us and our entire empirical existence – this is the inconceivable mystery of all spiritual activity. But the entire process of human culture, the strengthening and expansion to which its valuable achievements are subject in history, repeatedly confirms to us

Yet they nevertheless considered as essential the "existence of substantive a priori concepts and principles that make knowledge possible,"[144] though not necessarily those concepts and principles identified by Kant since the scientific theories he referred to were (partly) considered outdated.[145] What is particular to neo-Kantian philosophy is its proponents' interest in the scientific methodology and the question of how we can know anything about the different branches of science: in their words, "the logic of the sciences."[146]

For Cohen in particular, it was important to distinguish philosophy from psychology.[147] While the former, according to him, aims at objectivity, the latter is utterly subjective.[148] What Cohen aligns closely with Kant, however, is the "transcendental method," which, in Cohen's conception, "begins with a fact – paradigmatically, the fact of science – and investigates the conditions that make that fact possible."[149] Interestingly, the Marburgian transcendental

this upward growth of our life into rational contexts that mean more than ourselves" [footnotes omitted].

[144] Heis (n 140).

[145] See eg Natorp (n 143) 180 when addressing the Kant Society in Halle on April 27, 1912, who started his talk by stating that "[a]nyone wishing to advance in philosophy today considers it his first duty to come to terms with Kantian philosophy." However, Natorp goes on to clarify that "it was never anyone's wish nor intent to cling to Kant's doctrines in an absolute way. Talk of an orthodox Kantianism within the Marburg School was never justified, and it has lost every shred of supposed justification as this school has continued to develop."

[146] Heis (n 140) quoting (and translating) Hermann Cohen, "Biographisches Vorwort und Einleitung mit kritischem Nachtrag" in Friedrich Lange (ed) *Geschichte des Materialismus und Kritik seiner Bedeutung in der Gegenwart* (Baedeker 6th ed 1898) xv–lxxvi (x): "The transcendental method does not research the principles of human reason but rather the foundation of science that conditions scientific validity. Our organization is, insofar as it comes into question in general, a question of psychology; and there is at least no methodological means for procuring secure, scientific, and exact information from the ultimate and simplest parts of our mental essence. But the sciences lie before us in books. What makes them into sciences, wherein their character of generality and necessity rests, from which concepts their epistemological validity within their region can be derived, what tools and ways of knowing explain in its validity those historical facts of knowledge – the sciences – this is a methodological question, this is the question, which the sciences themselves pose, whenever they feel the impulse to think about their own principles – this and nothing else is the transcendental question."

[147] And so Cohen (n 141) 109 interpreted Kant in his *Kant's Theory of Experience*); and in *Logik der reinen Erkenntnis* (Cohen n 141) 44, where he distinguishes the "metaphysical a priori" and the "transcendental a priori." While the former, which can be empirically studied, is irrelevant to the transcendental philosopher, the latter only makes objective validity possible.

[148] Hermann Cohen, *Das Prinzip der Infinitesimal-Methode und seine Geschichte* (Dümmler 1883) § 6. For a partial translation, see Hermann Cohen, "'Introduction' to The Principle of the Infinitesimal Method and Its History (1883)" in Sebastian Luft (ed) *The Neo-Kantian Reader* (partial translation by David Hyder and Lydia Patton Routledge 2015).

[149] Heis (n 140) also with reference to Natorp (n 143); Cohen (n 148) § 7–9; Cohen (n 141) *Kant's Theorie der Erfahrung* § 12; and Alan Richardson, "'The Fact of Science' and Critique

method begins with a "fact" that is historically verifiable – a "fact of science" regarding theoretical philosophy and a fact of "social order" concerning practical philosophy.[150] In a second step, what makes objective validity possible is analyzed from this fact, by identifying the "laws" or "form" of the specific discipline.[151] The "goal of the transcendental method is to provide foundations for culture" that "are not meant to be certain" and, thus, "[t]ranscendental logic, one might say, is a semantic, not a Cartesian project."[152] Beyond that, Marburg neo-Kantians too considered themselves as "idealists," which is expressed in their transcendental method and their belief in substantive a priori principles that make experience possible. The conception of objectivity "grounded in the idea of the unity of knowledge according to laws" and their philosophy of science, which is held to be "radically unlike the features that the world appears to have to untutored, everyday experience," also point in this direction.[153]

What becomes apparent from this brief overview of neo-Kantianism is that neo-Kantian philosophers were actually ready to reconsider Kantian positions

of Knowledge: Exact Science as Problem and Resource in Marburg Neo-Kantianism" in Michael Friedman and Alfred Nordmann (eds) *The Kantian Legacy in Nineteenth-Century Science* (MIT Press 2006) 211–226.

[150] Heis (n 140) also with reference to Natorp (n 143).

[151] Paul Natorp, "'On the Objective and Subjective Grounding of Knowledge' (1887)" in Sebastian Luft (ed) *The Neo-Kantian Reader* (translated by Lois Phillips and David Kolb Routledge 2015 ["Über objective und subjective Begründung der Erkenntniss" (1887) 23 Philosophische Monatshefte 257–286]) 164–179 (esp 165): "If every science inquires after the objective foundation underlying each appearance of its truth, then every science must have some concept of this foundation and of the grounding relationship of the object to the appearance." Natorp goes on (165) by stating that "[a]ll scientific knowledge aims at the law. The relation of the appearance to the law (the relation of the 'manifold' of the appearance to the 'unity' of the law) must therefore explain the original relation to the object in all knowledge. The interpretation of the appearance in accordance with laws is taken as the objectively true interpretation. We may take as impartially established this universal correlation between law and object, ancient as it is in the history of philosophy and the sciences. It has been established not through the whim or the passion for system of this or that philosopher, but rather through the action of science that everywhere constitutes the object in law." Yet Natorp cautiously adds that "[g]iven these fundamentals we can confidently take a stand on the pending problems of logic. Whoever cannot agree with us on this common basis will probably find most of the following said in vain"; cf Cohen (n 141) *Logik der reinen Erkenntnis* § 11.

[152] Heis (n 140). See also Krijnen (n 139) 320: "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 explains the peculiar nature and unity of neo-Kantianism as well as its relation to Kant and ultimately its argumentative potential" [emphasis original].

[153] Heis (n 140).

quite extensively.[154] For Kant, roughly speaking, Aristotelian logic, Euclidian geometry and Newtonian mechanics were state of the art and thus the laws constituting and enabling our understanding of these approaches were "postulated as valid."[155] Neo-Kantians were aware that science advances and therefore the a priori needs to be adapted, even to the extent that they tried to understand and capture the evolution of science as well. By now our knowledge in each field has arguably advanced again noticeably, to put it mildly. What we learn is that maybe Kant was right in a sense that experience and our perception of experience preconditions some sort of form or faculty in us.[156] Yet what we might potentially consider as "given" has changed with the development of science since Kant thought about it and very likely will change again with further developments in the future.[157] Hence, it is of utmost importance to be very careful when postulating a given faculty or form as being a precondition for knowledge: "objective validity" in a neo-Kantian sense on the one hand and legal validity on the other. In fact, we should acknowledge that "objective validity" concerning our knowledge of the external world and the legal validity of norms must be kept apart. The law is arguably quite different from any physical object. Therefore, we have to take a

[154] In this regard consider the quote by the Badian neo-Kantian Wilhelm Windelband, *Präludien: Aufsätze und Reden zur Philosophie und ihrer Geschichte Vol I* (Mohr 5th ed 1915) iv, holding that "to understand Kant means to go beyond him." This famous quote also appears on the very first page of Sebastian Luft (ed) *The Neo-Kantian Reader* (Routledge 2015) v. See also Natorp (n 145), as well as Hermann Cohen, *Kants Theorie der Erfahrung* (Georg Olms 1987 *Hermann Cohen Werke Vol 1 I.3* [Dümmler 1st ed 1871]), where he states in the preface that he is about to justify Kant's doctrine of the a priori anew as to him this doctrine did not appear to be right in Kant's writing.

[155] See in this regard Guyer and Wood (n 70) 22: "Kant's bold attempt to resolve with one stroke two of the most pressing problems of modern philosophy has seldom been accepted by his successors without qualification. Some feel that Kant's identification of the basic principles of science with the fundamental principles of human understanding itself betrays too much confidence in the specifically Newtonian mechanistic physics that prevailed at his time, leaving too little room for subsequent scientific developments, such as the theory of general relativity and quantum mechanics."

[156] For a detailed state of the art analysis of a potential innate human faculty for cognizing morality, see Chapter 5.

[157] See Vittorio Hösle, *Hegels System. Der Idealismus der Subjektivität und das Problem der Intersubjektivität Vol 1: Systementwicklung und Logik* (Felix Meiner 1st ed 1987) 22–38, who points to Fichte (Johann Gottlieb Fichte, "Über den Begriff der Wissenschaftslehre" in *Werke Vol 1* (1971 [1834–1846]) 27–81, who already criticized that Kant's categories claim to constitute knowledge, but does not explain why this would be true knowledge. This is why Fichte developed a "doctrine of science" (*Wissenschaftslehre*).

close look at how to establish and argue for conditions necessary for *legal* knowledge.[158]

1.2.3 *Kelsenian Legal Epistemology*

Hans Kelsen claimed that his pure theory of law in the form of its basic norm is a priori necessary in order to cognize any legal order.[159] And so those who follow Kelsen are likely to elaborate on the "transcendental undergirding for legal science."[160] Kelsen asks, "how is positive law *qua* object of cognition, *qua* object of cognitive legal science, possible?"[161] Thereby he aims at establishing a "*legal* a priori" in the sense of Kant's "transcendental a priori."[162]

[158] This, however, is something that arguably needs an in-depth analysis of current state-of-the-art insights in psychology and neurobiology and will thus be postponed to Chapter 5.

[159] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Mohr Siebeck 1920) vi.

[160] Gragl (n 16) 64, quoting Carsten Heidemann, *Die Norm als Tatsache: Zur Normentheorie Hans Kelsens* (Nomos 1997) 43, who nevertheless mentions critically that Kelsen does not bother to give detailed explanations or justification for his transcendental thesis. Rather, he apodictically postulates them and uses their powerful associations for justifying their plausibility instead of arguing properly why they hold. See furthermore Gragl (n 16 19 n 2), claiming (and pointing to further references, such as Horst Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (Nomos 2nd ed 1990) 33, n 40, speaking of "eclecticism") that a detailed analysis of Kelsenian positions quickly reveals that his concepts and arguments are rather vague and are often insufficiently received sets of pieces of various philosophical directions. This would particularly be the case according to the epistemological basis of his theory. For a comparative overview of Hans Kelsen and other democratic scholars of public law during the Weimar period, see Kathrin Groh, *Demokratische Staatsrechtslehrer in der Weimarer Republik. Von der konstitutionellen Staatslehre zur Theorie des modernen demokratischen Verfassungsstaats* (Mohr Siebeck 2010).

[161] Hans Kelsen, *Natural Law Doctrine and Legal Positivism* (translated by Wolfgang Herbert Kraus as an appendix to Kelsen, *General Theory of Law and State* (Harvard University Press 1945 [1928]) 389–446 (437), quoted (and translated slightly differently by) Stanley L Paulson, "Kelsen's Legal Theory: The Final Round" (1992) 12 (2) Oxford Journal of Legal Studies 265–274. See also Hans Kelsen, *Pure Theory of Law* (University of California Press 2nd ed 1967) 202: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?" Kelsen does so explicitly following Kant when he (*Pure Theory of Law* 202) quotes "Kant asks: 'How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our sense, in the laws of nature formulated by natural science?'").

[162] Gragl (n 16) 66 with further reference (also to Robert Alexy, "Hans Kelsens Begriff des relativen Apriori" in Robert Alexy et al (eds) *Neukantianismus und Rechtsphilosophie* (Nomos 2002) 179–202 (194), however, comes to the conclusion that the Kelsenian a priori is relativized because of necessity the law must include morality (Gragl n 16 201–202) and that this "construction of the concept of 'ought' hence represents the ambitious attempt to complement Kant's table of categories by one additional category." Cf Claudius Müller, *Die Rechtsphilosophie des Marburger Neukantianismus: Naturrecht und Rechtspositivismus in der*

In this vein, Kelsen's clear vision to uphold the is–ought dichotomy is also of interest.[163] To him, law – the ought – is one thing, and the is – politics, psychology, sociology, morality – is something to be held clearly distinct.[164] In fact, this is the essence of his quest for purity. As describing and prescribing are acts to be held apart,[165] the science of law must be distinguished from natural and other sciences.[166] As with causality, Kelsen claims, legal validity also must find its final source. In his words, the "search for the reason of a norm's validity ... must end with a norm which, as the last and highest, is *presupposed*."[167] And thus "[s]uch a presupposed higher norm is referred to in this book as basic norm."[168] This, importantly, is connected with the claim that the validity of one norm can only derive from another norm.[169] It is of particular interest for our purpose that precisely this feature of the Kelsenian pure theory of law, and thus also of Kelsenian legal monism, is referred to as "Kelsen's reply to the juridico-transcendental question." It is claimed that this stipulation is "[i]n a similar fashion to Kant's 'Copernican revolution' through which he realized that a priori (i.e. necessary) knowledge is not possible by conforming intuition to the nature of objects, but by conforming the object to

Auseinandersetzung zwischen Hermann Cohen, Rudolf Stammler und Paul Natorp (Mohr Siebeck 1994).

[163] For the approach on the is–ought dichotomy adopted by this thesis, see below, 69–70.

[164] Kelsen (n 161) *Pure Theory* 1; Hans Kelsen, *Allgemeine Staatslehre* (Springer 1925) 62, holding that not the human being but the legal person is the subject of the law.

[165] Kelsen (n 161) *Pure Theory* 5–6, where he explicitly states: "The difference between *is* and *ought* cannot be explained further. We are immediately aware of the difference. Nobody can deny that the statement: 'something is' – that is, the statement by which an existent fact is described – is fundamentally different from the statement: 'something ought to be' – which is the statement by which a norm is described. Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa." Yet it is important to acknowledge that Kelsen (n 161 6) also holds that "[t]his dualism of is and ought does not mean, however, that there is no relationship between *is* and *ought*" [emphasis original]. He further explains (6) that the is and the ought "are two different modi" and hence "[o]ne and the same behaviour may be presented in the one or the other of the two modi." Yet he holds that "[t]herefore it is necessary to differentiate the behaviour stipulated by a norm as a behaviour that ought to be from the actual behaviour that corresponds to it."

[166] Kelsen (n 161) *Pure Theory* 8–9, introducing the concept of the basic norm which provides for the objective validity of "norms of a moral or legal order."

[167] Kelsen (n 161) *Pure Theory* 194. He clearly adds here (194–195) that this highest norm "must be *presupposed*, because it cannot be 'posited', that is to say: created, by an authority whose competence would have to rest on a still higher norm" [emphasis original].

[168] Kelsen (n 161) *Pure Theory* 195. See also Kelsen (n 26) 111: "The reason for the validity of a norm is always a norm, not a fact. The quest for the reason of validity of a norm leads back, not to reality, but to another norm from which the first norm is derivable in a sense that will be investigated later."

[169] Kelsen (n 161) *Pure Theory* 198.

our intuition."[170] And almost in the same breath we learn that "the true status of the basic norm" is "a neo-Kantian transcendental notion and answer to the … juridico-transcendental question in the sense of Hermann Cohen's philosophy."[171]

These propositions are claimed to be made following Hermann Cohen, and hence are claimed to be in accordance or at least reconcilable with the so-called neo-Kantian school from Marburg.[172] One idea of neo-Kantianism was

[170] Gragl (n 16) 72 and 74: "In analogy to Kant's transcendental self, the *Grundnorm* is a *condition for* legal knowledge, and not an *object of* legal knowledge." On this see also Paulson (n 137) 313: "Kelsen would have his Pure Theory of Law understood as a theory of legal cognition, of legal knowledge. He writes again and again that the sole aim of the Pure Theory is cognition or knowledge of its object, precisely specified as the law itself." See also Bert van Roermund, "Norm-Claims, Validity, and Self-Reference" in Luís Duarte d'Almeida, John Gardner and Leslie Green (eds) *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 11–42, who, however, makes the need explicit to differentiate between validity and bindingness. Beyond that, he argues that "Kelsen's own account of the basic norm commits him to the kind of 'recognition' theory of normativity which … he professed to reject" (11).

[171] Gragl (n 16) 74. Besides the numerous contributions referring critically to or praising the work of Hans Kelsen, see also, particularly on the transcendental aspect, Gerhard Luf, "On the Transcendental Import of Kelsen's Basic Norm" in Stanley L Paulson and Bonnie Litschewski-Paulson (eds) *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford Clarendon Press 1998) 221–234 (233), holding that "the familiar formulation of the basic norm … point[s] to an altogether specific concept of law, a concept that is dependent on provisional methodological determinations and that does not possess a timeless quality at all"; and Stanley L Paulson, "The Great Puzzle: Kelsen's Basic Norm" in Luís Duarte d'Almeida, John Gardner and Leslie Green (eds) *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 43–62 (49 ff), who, however, concludes that no Kantian transcendental argument undergirding the Kelsenian basic norm is sound.

[172] On this claim see Gragl (n 16) 64, n 62, quoting a letter from Kelsen to Treves, Hans Kelsen, "The Pure Theory of Law, 'Labandism', and Neo-Kantianism: A Letter to Renato Treves" in Stanley L Paulson and Bonnie Litschewski Paulson (eds) *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998) 169–175 (171): "It is altogether correct that the philosophical foundation of the Pure Theory of Law is the Kantian philosophy, in particular the Kantian philosophy in the interpretation that it has undergone through Cohen." See also Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* (Scientia 2nd ed 1923) vi and xvii. Cf Paulson (n 137). Cf Gragl (n 16) 65, n 74, claiming that Kelsen follows Cohen (n 141) *System der Philosophie, Zweiter Teil: Ethik des reinen Willens* 29; see also Hermann Cohen, *Logik der reinen Erkenntnis* (Cassirer 3rd ed 1922) 12, stating that for objective rules for the interpretation of meaning its logical structure must be an axiom. Otherwise, we would have to provide for the source of the necessary laws of logic based on either metaphysics or empirical facts. For this reference see Gragl (n 16) 59, nn 15 and 16 with further reference to Rintelen (n 142) 23–24, which, however, is more an overview of "German idealism" than a strict defense. For the critique that Kelsen would only seemingly connect to Marburgian neo-Kantianism (as the latter for instance clearly requires an existing object), see eg Voegelin (n 138) 109. For the qualification that only the earlier Kelsen was an adherent of (neo-) Kantianism and the later Kelsen was more Humean, see Andrei Marmor, "The Pure Theory of Law" in Edward N Zalta (ed) *Stanford Encyclopedia of Philosophy* (4 January 2016) available at https://plato.stanford.edu/entries/lawphil-theory/ [last accessed February 1, 2023], albeit with

to transport Kantian epistemology, which was mainly directed at the natural sciences, to other disciplines. The point was to discover the necessary preconditions of science (and thereby to confront empiricism[173] or, in positive terms, to emphasize the scientific nature of philosophy).[174] Nevertheless, friction is unavoidable when transplanting to the field of law and legal science ideas that were originally expressed with regard to natural sciences and knowledge in general and the external world in particular.[175] To Kelsen, it was obviously clear that law is a system of norms made by human beings for human beings.[176] In his words, "when we compare the objects that have been designated by the word 'law' by different peoples at different times, we see that all these objects turn out to be *orders of human behavior*." An "order," he goes on, "is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity; and the reason for the validity of a normative order is a basic norm . . . from which the validity of all norms of the order are derived."[177] Within a Kantian tradition one thus has to argue why one thinks that scientific metaphysics, in other words a transcendental method, is considered necessary for cognizing the law. Kant himself

further reference to Paulson (n 171) and Michael S Green, "Marmor's Kelsen" in D A Jeremy Telman (ed) *Hans Kelsen in America* (Springer 2016) 31–55, who disagree.

[173] See Friedrich Lohmann, *Karl Barth und der Neukantianismus. Die Rezeption des Neukantianismus im "Römerbrief" und ihre Bedeutung für die weitere Ausarbeitung der Theologie Karl Barths* (De Gruyter 1995) ch 1 with many references.

[174] Cf Dreier (n 160) 70. Note that Kelsenian ideas must be differentiated from those of other neo-Kantian legal philosophers such as Rudolf Stammler and Emil Lask, as Kelsen postulated a very strict value neutrality from the perspective of legal science. See Jakab (n 35) 1045, n 4 with further reference to Rudolf Stammler, *Die Lehre vom richtigen Rechte* (De Gruyter 1902); Emil Lask, *Rechtsphilosophie* in id, *Gesammelte Schriften Vol 1* (Paul Siebeck 1923) 275 ff. See also Stanley L Paulson, "Zur neukantianischen Dimension der Reinen Rechtslehre. Vorwort zur Kelsen-Sander-Auseinandersetzung" in Stanley L Paulson (ed) *Die Rolle des Neukantianismus in der Reinen Rechtslehre. Eine Debatte zwischen Sander und Kelsen* (Scientia 1988) 7–26.

[175] See, however, Cohen (n 141) *System der Philosophie, Zweiter Teil: Ethik des reinen Willens* 66, qualifying legal science as the mathematics of the humanities in general and ethics in particular.Cf on Cohen, Lohmann (n 173) 65–129, and on this issue esp 84–87.For a critical perspective, see Jonathan Trejo-Mathys, "Neo-Kantianism in the Philosophy of Law: Its Value and Actuality" in Nicolas de Warren and Andrea Staiti (eds) *New Approaches to Neo-Kantianism* (Cambridge University Press 2015) 147–170 (164): "Intriguing as the idea is, few if any have found this analogy persuasive. It seems to go wrong from the beginning and to result from a forcing of the subject-matter of law and ethics into the structural requirements of Cohen's 'transcendental method,' which requires philosophical reflection to begin with the 'fact' of some 'science' or other."

[176] Kelsen (n 161) *Pure Theory* 3 ff, 30 ff.

[177] Kelsen (n 161) *Pure Theory* 31 [emphasis original].

apparently did not think it was.[178] Arguments are necessary for why the law, too, has a priori law-specific attributes.[179] Mere postulations that only then could law be cognized in a "pure way" are not sufficient as such claims result in a vicious metaphysical circle. Moreover, when following the Marburg neo-Kantian tradition, it is important to explain why this school of neo-Kantianism, more focused on the natural sciences, was chosen instead of the Badian approach focused on humanities. In addition, when following a neo-Kantian tradition, it is important to set out the social fact that has to be identified first. Only from this fact, in a second step, can objective validity be constituted according to neo-Kantianism, as briefly outlined above.[180] Moreover, this fact needs to be historically verifiable. Merely claiming that the term "law" has always turned out to be an order of human behavior determined "by different peoples at different times"[181] is rather weak in this regard.[182] In addition, neo-Kantians understood themselves as idealists. It does not seem that such a

[178] See the reference to Kelsenians admitting this below n 193.

[179] To be fair, Kelsen states in the first edition of his *Pure Theory of Law* (Hans Kelsen, *Introduction to the Problems of Legal Theory* (translated by Bonnie Litschewski Paulson and Stanley L Paulson Oxford Clarendon Press 1992 [*Reine Rechtslehre* 1934]) § 16, and sec § 50 (e)) that "the Pure Theory is well aware that one cannot prove the existence of the law as one proves the existence of natural material facts and the natural laws governing them, that one cannot adduce compelling arguments to refute a posture like theoretical anarchism, which refuses to see anything but naked power where jurists speak of the law." See, however, on the anarchist, 48.

[180] See Section 1.2.2.

[181] Kelsen (n 161) *Pure Theory* 31.

[182] See, however, Paulson (n 172) for an interesting interpretation of Kelsen starting from what he calls a "jurisprudential antinomy." Such antinomy follows from what Kelsen terms "natural law theory" and "empirico-positivist theory" as being "not only mutually exclusive, but also jointly exhaustive of the possibilities," and thus the refutation of both theories (Paulson n 172 314). In Paulson's words (n 172 314), "[f]or if one holds that the two traditional types of theory together exhaust the field, precluding any third type of theory, and if one holds, furthermore, that neither type of theory is defensible, then one faces an antinomy – the *jurisprudential antinomy*, as I shall call it" [emphasis original]. Based on this antinomy, Paulson interprets Kelsen as having offered a "regressive version of the Transcendental Argument" (n 172 329 ff), which basically holds that "the very possibility of cognition of legal norms presupposes the application of a category or normative imputation" as the only way "to anchor a legal philosophy that brings together the normativity thesis and the separability thesis." Paulson (n 172 332), however, reaches the conclusion that "the so-called regressive version of the transcendental argument, severed from the progressive version, collapses into a mere scheme of analysis." Beyond that, we could add that such an interpretation hinges on the persuasiveness of the refutation of "natural law theories" and "empirico-positivist theories." This is, first, quite a heavy load for the transcendental sphere, and second, faces the challenge that the modern version of the law vs morality debate is identified by some at least as false problems (*Scheinprobleme*), see eg Dietmar von der Pfordten, *Rechtsphilosophie. Eine Einführung* (C H Beck 2013) 66–78, esp 77.

classification would be accepted by Kelsenians. Rather, I suspect they would claim that their only idealization would be the purity of the law.

Beyond that, it is notable that Kelsen himself stated that no one can be forced to use the basic norm as a scheme to interpret the law.

> [A]n anarchist, for instance, who denied the validity of the hypothetical basic norm of positive law (theoretical anarchism always somehow shares the position of natural law, the theory of pure natural law that of anarchism), will view its positive regulation of human relationships (such as property, the hiring contract) as mere power relations and their description as "ought" norms a mere "fiction," as an attempt to supply a justifying ideology.[183]

This example shows that the Kelsenian basic norm is not a necessary condition for thinking about the law in a transcendental Kantian sense,[184] as the anarchist cognizes the very same act as, for instance, the police force. However, as Kelsen claims, to the anarchist this is not the law in action but brute illegitimate force. This understanding nourishes doubts that the Kelsenian position might collapse into a solipsistic understanding of the law where the subjective perception of the anarchist melts into the object – that is, the act he or she is cognizing. This even goes so far as Kelsen himself stating that international life might only be cognized via anarchy guided by power (instead of through a basic norm and thus monism with the primacy of international law, for instance).[185] If this is the case, however, how can we be sure that every lawyer will use this scheme? And, more importantly, if this is a personal decision depending on the Kantian assumption as referred to earlier, how can we ever be sure that this scheme is shared by different legal scholars, different legal cultures and so on? I submit that we cannot, especially if we remember the criticism advanced against the Kantian position by several philosophers, accusing it of falling short of solipsism.[186] Hence, if we take a skeptical stance towards the Kantian position and consider a development by Arthur Schopenhauer stating that "every man takes the limits of his own field of vision for the limits of the world,"[187] this critique becomes all the more

[183] Kelsen (n 26) 413.

[184] See on this Alexy (n 162) 200, who, however relativizes the relativization of the Kelsenian a priori.

[185] See Jakab (n 35) 1047, n 14, with reference to Hans Kelsen, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures 1940–41* (Harvard University Press 1942) 48, 54.

[186] See Section 1.2.1.

[187] Arthur Schopenhauer, "Further Psychological Observations" in *Suffering, Suicide and Immortality. Eight Essays from The Parerga* (selected and translated by T Bailey Saunders Dover 2006 [*Parerga und Paralipomena. Kleine Philosophische Schriften* 1851]) 39–62 (46),

pressing. Hence, due to the Kantian assumptions, the critique these assumptions face, and these thoughts advanced by Kelsen himself, we have to classify the Kelsenian pure theory of law and its basic norm as "legal theoretical solipsism."[188] This critique might be responded to with a rather thick shared transcendental understanding of what legal validity and, hence, the law actually are. If we presumed such a thick legal a priori as given to any lawyer, we could establish a response to the legal solipsism reproach. This, however, becomes even more troublesome as it brings us into legal metaphysics – something that the pure theory of law claims to avoid. This critique is also illuminating. We can conclude that the more we aim for purity, the more we need to consult a priori legal knowledge. Only then can we ensure that lawyers will use the same scheme when interpreting the law.

Finally, with regard to neo-Kantianism, it has to be said that this philosophical movement was popular from around 1870 until the First World War.[189] The briefly outlined further developments, particularly concerning the linguistic turn in philosophy and epistemology alike, must be taken into account when a historical epistemological account such as Kantian or neo-Kantian epistemology is advocated in the twenty-first century.[190] And, in more general terms, there are philosophical voices stating that we cannot even be sure that we are not simply a computer simulation controlled by an advanced human society.[191] It is hard to establish certainty concerning a guarantee that what I see as what is there and what you see as what is there actually is there and that our perceptions are comparable. We need to account for that in our theoretical thinking if we want to fulfil scientific standards of philosophical thinking and argument. Yet the law is quite a special scientific discipline. Law's normativity is puzzling. It is hard to separate a description of facts and a prescription of how to act. Despite these difficulties, it is very likely a theoretical overload to mix these questions with epistemological puzzles.

Astonishingly, we can find arguments by convinced and well-established scholars who commit themselves to the pure theory of law, stating that even if Kant or neo-Kantians actually had a different project in mind or are simply

interpreting the noumenal and the phenomenal as one world with will and representation as different aspects of it.

[188] See Jakab (n 35) 1047–1048, n 15, where he further doubts that the schemes of various legal scholars to interpret the law are the same. Much points in the direction that they are, indeed, not the same. This is even suggested by the Kelsenian standpoint that the interpretation of law includes a subjective element. See Kelsen (n 161) *Pure Theory* 348 ff.

[189] Heis (n 140).

[190] See Section 1.2.1.

[191] Nick Bostrom, "Are You Living in a Computer Simulation?" (2003) 53 (211) Philosophical Quarterly 243–255.

misrepresented by the Kelsenian pure theory of law, this would not be a serious problem for the pure theory of law.[192] According to them, Kelsenian pure theory stands alone and even epistemological "realists" "today" (writing in 1991) would concede that knowledge (*Erkenntnis*) necessarily presupposes a combination of judgments a priori and a posteriori.[193] It is conceded that this understanding, which, certainly reflects an important insight, is nevertheless understood differently by the "realists" referred to above.[194] They consider the statement that the manner of cognizance constitutes the object not as a transcendental necessity, but as a consequence of scientific methodological procedure which entails – and this is by no means unimportant – that the methodology applied partly constructs the object. Therefore, science must use rigorous methodology. This, in turn, has the consequence that the methodology can and, depending on the progress of science, must be adapted. That the *act of choosing* a specific methodology has normative implications and must be appropriate is conceded by Kelsenian legal scholars[195] but without drawing the correct conclusions from doing so. On the contrary, this is taken as another confirmation of the pure theory of law[196] (and at the same time used to dismiss a contested view of analyzing the Austrian federal state as done by Peter Pernthaler, Theo Öhlinger, Karl Weber and others[197]).

[192] Rudolf Thienel, "Ein 'komplexer' oder ein normativer Bundesstaatsbegriff?" (1991) 42 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht (ZÖR) 215–252 (240, n 88)

[193] Again Thienel (n 192) 240 in n 87, quoting besides Kant's *Critique of Pure Reason* (2nd ed 1787) 74 ff also Kant's Metaphysics of Morals (2nd ed 1789) 31 f. This readily departs from Kelsen himself and some Kelsenians. See n 137 above.

[194] See Thienel (n 192) 240, n 89, quoting Hans Albert, *Konstruktion und Kritik. Aufsätze zur Philosophie des kritischen Rationalismus* (Hoffmann und Campe 2nd ed 1975) 13 ff, esp 17 ff holding that "realists" would hold that the a priori only has a hypothetical character and, thus, can be criticized in the realm of specific scientific disciplines. However, this would change nothing with regard to the fundamental importance of the transcendental question of Kant.

[195] Thienel (n 192) 241, 90 and 91 with reference to Karl Popper, *Logik der Forschung* (Mohr Siebeck 8th ed 1984) 12 f; and Hans Albert, *Kritik der reinen Erkenntnislehre* (Mohr Siebeck 1987) 70 ff, esp 84 ff. See also Thienel (n 192) 218, holding that he is aware of the necessity, but also the free choice, of the specific direction of aiming at knowledge, the object of knowledge, and the method of cognizing knowledge providing further references in n 9 to Karl Popper (Thienel n 192 12–13); Albert (Thienel n 192 70 ff); Hans Albert, *Traktat über rationale Praxis* (Mohr Siebeck 1978) 33 ff; Victor Kraft, *Erkenntnislehre* (Springer 1960) 32. However, none of the quoted references supports the interpretation of the pure theory of law as the unique way of cognizing norms or as the unique legal method as advanced by Thienel.

[196] Thienel (n 192) 241.

[197] See eg Peter Pernthaler, "Der österreichische Bundesstaat im Spannungsfeld von Föderalismus und formalem Rechtspositivismus" (1969) 19 Zeitschrift für öffentliches Recht 361–379 (369); Theo Öhlinger, *Der Bundesstaat zwischen Reiner Rechtslehre und Verfassungsrealität* (Braumüller 1976); Peter Pernthaler, *Die Staatsgründungsakte der österreichischen Bundesländer: Eine staatsrechtliche Untersuchung über die Entstehung des Bundesstaates* (Braumüller 1979); Peter Pernthaler, *Allgemeine Staatslehre und*

The law is quite different from the question of what constitutes knowledge about the external world and how we acquire it. The law is simply a tool for organizing our social life. Thus, in the same way as it is not important for our daily life to reflect on whether a tiger we perceive as standing in front of us really is there (on the contrary, this is probably a bad moment to reflect on the existence of the external world), it is not of primary importance to reflect on what the law "actually" is and whether it "really" exists. Law is a practical tool. Whether law is good or bad depends to a considerable extent on whether it works or not – whether it is efficient. This was even acknowledged to some extent by Hans Kelsen.[198] Thus, it is very likely not the best choice to base our understanding of the law on a rather solipsistic understanding of epistemology holding that the method of cognizance fully constitutes the object of cognizance.

Law asks for a practical understanding of epistemology. To the same extent that I am satisfied if I ask you to bring me a red T-shirt and you – no matter what you perceive as red – manage to bring me a T-shirt that satisfies my "redness expectation," it is enough for our legal life that what we perceive as law is able to account for an intersubjective organization of social life.[199]

What it boils down to is that the Kelsenian pure theory of law and thus also Kelsenian monism is not a necessary condition for thinking about the law. It is a mere invitation to set up specific axioms to talk about law in a specific way. It has been and still is a radical way to claim that only this very specific way of thinking about the law can be called proper or pure legal scholarship, because

Verfassungslehre (Springer 1984) 404 ff; Karl Weber, *Kriterien des Bundesstaates: Eine systematische, historische und rechtsvergleichende Untersuchung der Bundesstaatlichkeit der Schweiz, der Bundesrepublik Deutschland und Österreichs* (Braumüller 1980) 79 ff; Peter Pernthaler and Karl Weber, "Bundesverfassung und Föderalismus" (1982) 21 (4) Der Staat 576–590; Peter Bußjäger, *Homogenität und Differenz: Zur Theorie der Aufgabenverteilung zwischen Bund und Ländern in Österreich* (Braumüller 2006).

[198] Kelsen (n 161) 212: "A legal order is regarded as valid, if its norms are by and large effective (that is, actually applied and obeyed)." This statement, however, must not be interpreted as of effectiveness equaling validity for effectivity is a necessary but not a sufficient condition for validity. See Hans Kelsen, *Reine Rechtslehre* (Franz Deuticke 1934) 70. For the interpretation that the effectiveness of a normative order is an arbitrary criterion merely of heuristical value for the assumption of its validity, which is the basic norm, see Wolf-Dietrich Grussmann, "Grundnorm und Supranationalität – Rechtsstrukturelle Sichtweisen der europäischen Integration" in Thomas von Danwitz et al (ed) *Auf dem Wege zu einer europäischen Staatlichkeit* (1993) 47–64 (50) with further reference (n 10) to Adolf J Merkl, "Hans Kelsens System einer reinen Rechtslehre" (1921) 41 Archiv des öffentlichen Rechts 171–202 (179).

[199] For an interesting and much more elaborated account of these questions relying on the late Wittgenstein, see Dennis Patterson, *Law and Truth* (Oxford University Press 1996). See also Poscher (n 134) for a discussion of the deflationary theory of truth without negating legal science as well as Miodrag A Jovanović, *The Nature of International Law* (Cambridge University Press 2019) for a prototype theory of concepts approach concerning international law.

this claim necessarily entails that if you do not agree on the axioms you are not doing legal science. You can do so as much as you are free to play tennis at the weekend in your leisure time, but when you want to talk about law at university, you must accept the axioms. This is quite a hostile way of doing science. However, due to its sharp contrast and its radicality it has attracted a lot of attention. The critique advanced here is, to repeat myself, not a blatant rejection of thinking and speaking like this about the law. However, the abovementioned criticism has made clear that, so far, no one has proven why the axioms chosen by the pure theory of law should be the only necessary conditions for thinking about the law. They were merely postulated. From this it follows that they are not hardwired in our brains as some sort of innate legal faculty; nor are they other commonly achieved preconditions for cognizing the law. It is simply an offer you can accept, which, on acceptance, provides you – admittedly – with a clear-cut language (with all its advantages and disadvantages). From this it follows, however, that you can also decline this offer, establish another methodology and still think and speak about the law.

In fact, the Kelsenian pure theory of law bears resemblance to *a* religion.[200] You can believe in it, or not. The high priests and true believers of Kelsenianism might tell you that this is the only truth and that there is no other true system of law. However, the mere existence of other religions with competing claims about the purpose of legal life and its claimed eternity simply show that this is one of many possible ways to think about the law. Moreover, the criticism advanced above forces us to draw the conclusion that it is not the most convincing way. In another metaphor, it is important to know the vocabulary of the Kelsenian language if you want to talk meaningfully to a Kelsenian. Yet it is by no means the only true legal language in the legal world. From this it follows that the claim that everything that is expressed in Kelsenian legal language represents legal science and, conversely, anything else is unscientific – or probably representing sociology, morality, but definitively not within the realm of legal science – is rather bold and should be rejected.[201]

[200] See also Paulson (n 172) 322 as well as Paulson (n 171) 61, albeit admittedly in far less dramatic terms after having shown that while the pure theory of law cannot offer a convincing transcendental argument, it nevertheless "does not follow that Kelsen's Pure Theory of Law collapses with it. Rather the Pure Theory must simply take its place alongside other normativist legal theories, subjecting itself to the same evaluation they undergo. What will have changed, if the Pure Theory is evaluated in this way, is its claim to uniqueness, its claim to being the only possible normativist legal theory *sans* natural law. This claim – relying as it does on a transcendental argument that cannot be made to work – must be abandoned" [emphasis original]. See, however, n 34 for scholars who hold that the pure theory of law stands or falls with its epistemological premises.

[201] For a critique of this particular feature of Kelsenian pure theory of law, see his pupil Voegelin (n 138) 117–118. See also Erich Voegelin, "Kelsen's Pure Theory of Law" (1927) 42 (2)

1.2.4 *Kelsenian Monism and the Solution of Norm Conflicts between Legal Orders*

Leaving the critique advanced against Kelsenian epistemology to one side, let us assume that we can accept the epistemological basis of legal monism. If we do so, we still need to provide arguments for why and how Kelsenian monism is superior when explaining the relationship between legal orders in general, and when looking for a convincing solution to norm conflicts in particular. Concerning the latter, Kelsen claims that the solution to norm conflicts between different legal orders follows "logically" from the theoretical stance of Kelsenian monism. This, however, faces a serious restriction due to its Kantian basis:

> Yet such a principle [of systematicity] does not prescribe any law to objects . . . but rather is merely a subjective law of economy for the provision of our understanding, so that through comparison of its concepts it may bring their universal use to the smallest number, without justifying us in demanding of objects themselves any such unanimity as might make things easier for our understanding or help it extend itself, and so give objective validity to its maxims as well.[202]

Against this background, it is notable that the norm conflict between "different systems of norms" is construed as a legal epistemological impossibility in Kelsenian legal monism.

> [T]he assumption of two truly different systems is revealed as false. If there should be two actually different systems of norms, mutually independent in their validity . . . both of which are related to the same object (in having the same sphere of validity), insoluble logical contradiction could not be excluded.

Political Science Quarterly 268–276, providing, however, more a positive overview than criticism. Günther Winkler is also critical of Kelsenian epistemology in *Rechtstheorie und Erkenntnislehre. Kritische Anmerkungen zum Dilemma von Sein und Sollen in der Reinen Rechtslehre aus geisteswissenschaftlicher und erkenntnistheoretischer Sicht* (Springer 1990), and was responsible for the republication of Voegelin's book. Beyond that we learn from Günther Winkler's preface (*Geleitwort*) in this republication that Voegelin's thesis supervisor (*Doktorvater*) was Othmar Spann and his second supervisor Hans Kelsen. For his habilitation thesis, too, the examiners were Spann and Kelsen. And while Kelsen offered some genuine praise, Voegelin was denied the *venia legendi* (the prerequisite for lecturing at Austrian and German Universities as a Professor) in the discipline of "state theory" (*Staatslehre*) in 1928, only receiving it in 1931. For this and more details on the relationship between Voegelin and Kelsen, see Günther Winkler, Geleitwort in Voegelin (n 138) v–vi.

[202] Kant (n 36) A 306 / B 362. See Nicholas Rescher, *Epistemology. An Introduction to the Theory of Knowledge* (State University of New York Press 2003) 233, n 3, citing Kant as "the first philosopher clearly to perceive and emphasize this crucial point" and furthermore pointing to Peirce's "idea that the systematicity of nature is a regulative matter of scientific attitude rather than a constitutive matter of scientific fact." Charles Sanders Peirce, *Collected Papers Vol VII* (Harvard University Press 1958) sect 7.134.

> The norm of one system may prescribe conduct A for a certain person, under a certain condition, at a certain time and place. The norm of the other system may prescribe, under the same conditions and for the same person, conduct non-A. This situation is impossible for the cognition of norms.[203]

This is a rather astonishing thesis as it seems that, yet again, the a priori prerequisites are rather overloaded. It is thus important to take a closer look at this claim as well.[204] In cases of norm conflict, the monistic doctrine needs to deal with the question of which jurisdiction prevails – international or national law, and now international, EU or national law. However, a monistic doctrine with the so-called primacy of national law must be traced back to a highly nationalistic view of international law, which no longer can be considered suitable.[205] In other words, how could popular sovereignty in the form of national law (and thus one people only) rule over international or EU law without denying the validity of international or EU law? How should the validity of, say, EU law be based on the popular sovereignty of a single Member State's legal order and the popular sovereignty of one nation instead of all Member States' legal orders and their respective nations?[206] The failure

[203] Kelsen (n 26) 408.

[204] See Valentin Jeutner, *Irresolvable Norm Conflicts in International Law – The Concept of a Legal Dilemma* (Oxford University Press 2017) 121 ff with further references (esp 122 holding that "[i]ndeed, the law of non-contradiction and the explosion principle [which 'provides that a true contradictory statement causes the statement's normative reference system (a legal system, for example) to degenerate into triviality where any statement is true'] are by no means necessary principles of any logical system" [footnotes omitted]).

[205] Cf Lando Kirchmair, "The "Janus Face" of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law" (2012) 4 (3) Goettingen Journal of International Law 677–691 (688). Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre* (JCB Mohr 2nd ed 1928) 317, himself equated the monistic doctrine with the primacy of national law as the "negation of all law". However, later on he left the decision up to politics, see Kelsen (n 17) 339 ff. Interestingly, Gragl (n 16) 33, 110–124, following some other members of the Vienna school of jurisprudence (Josef L Kunz, "On the Theoretical Basis of the Law of Nations" (1925) 10 Transactions of the Grotius Society 115–142 (139); Josef L Kunz, "La primauté de droit des gens" (1925) 6 Revue de droit international et de législation comparé 556–598 (572 ff); Josef L Kunz, *Völkerrechtswissenschaft und Reine Rechtslehre* (Deuticke 1923) 82; as well as Verdross (n 15) 33 ff; Alfred Verdross, "Grundlagen und Grundlegungen des Völkerrechts – ein Beitrag zu den Hypothesen des Völkerrechtspositivismus" (1921) 29 Niemeyers Zeitschrift für internationales Recht 65–91 (82–83)) – and deviating from Kelsen – claims that we have to rule out Kelsenian monism with primacy of national law for epistemological reasons as well.

[206] Compare also Walz (n 7) 40, who classified this perception of monism as "pseudomonistic"; see also Starke (n 11) 77, where he stated that "[r]educed to its lowest terms, the doctrine of State primacy is a denial of international law as law, and an affirmation of international anarchy."

of the monistic conception of the primacy of municipal law to answer these questions is left aside here.

Monism with the primacy of international law has attracted a lot more attention. In order to justify the primacy of international law, the monistic doctrine stipulated the premise of a hypothetical unity – being kept together by the "chain of validity."[207] The ultimate foundation of validity is Hans Kelsen's famous basic norm briefly touched on above.[208] It is a concept that accounts for the unifying foundation of law and its validity.[209] The basic norm is an attractive but problematic concept, which has found many diverging interpretations by admirers[210] and critics alike.[211] The concept of the "chain of validity" is even more troublesome.[212] Kelsen holds that

> [a] norm of general international law authorizes an individual or a group of individuals on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm [of general international law], thus, legitimates this coercive order [of a "state" in the meaning of international law] for the territory of its actual effectiveness as a valid legal order and the community constituted by this coercive order as a "state" in the sense of international law.[213]

Similarly, Verdross argues from the viewpoint of an international basic norm – which in Verdross' conception is *pacta sunt servanda*[214] – from which

[207] The term "chain of validity" stems from Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford University Press 2nd ed 1980) 105; Starke (n 11) 75; Catherine Richmond, "Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law" (1997) 16 (4) Law and Philosophy 377–420 (388).

[208] Kelsen (n 17) 196 ff.

[209] For a brief explanation, see Gragl (n 25) 671–673.

[210] Kelsen (n 213) 193 ff, 221; Robert Walter, "Entstehung und Entwicklung des Gedankens der Grundnorm" in Robert Walter (ed) *Schwerpunkte der Reinen Rechtslehre* (Manz 1992) 47–59 (47); Robert Walter, "Die Grundnorm im System der Reinen Rechtslehre" in Aulis Aarnio et al (eds) *Rechtsnorm und Rechtswirklichkeit: Festschrift für Werner Krawietz* (Duncker & Humblot 1993) 53–74 (85); Heinz Mayer, "Rechtstheorie und Rechtspraxis" in Clemens Jabloner and Friedrich Stadler (eds) *Logischer Empirismus und Reine Rechtslehre: Beziehungen zwischen dem Wiener Kreis und der Hans Kelsen Schule* (Springer 2002) 319–331; Ralf Dreier, "Bemerkungen zur Theorie der Grundnorm" in Hans Kelsen-Institut (ed), *Die Reine Rechtslehre in wissenschaftlicher Diskussion* (Manz 1982) 38–46 (39).

[211] Norbert Hoerster, *Was ist Recht? Grundfragen der Rechtsphilosophie* (C H Beck 2006) 134, 138 ff; Peter Koller, "Meilensteine des Rechtspositivismus im 20. Jahrhundert: Hans Kelsens Reine Rechtslehre und H. L. A. Harts 'Concept of Law'" in Ota Weinberger and Werner Krawietz (eds) *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* (Springer 1988) 129–178 (157 ff); Griller (n 11) Völkerrecht und Landesrecht, 87–89; Schroeder (n 2) 75 ff.

[212] For criticism, see András Jakab, "Problems of the Stufenbaulehre: Kelsen's Failure to Derive the Validity of a Norm from Another Norm" (2007) 20 (1) Canadian Journal of Law and Jurisprudence 35–67.

[213] Kelsen (n 161) *Pure Theory* 193–215, 215.

[214] Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926) preface, 21–23, and 30–31.

municipal law also derives: "The freedom of States is nothing else than a margin of discretion depending on international law."[215] According to him, the lawmakers of public international law are not States, but the international community, acting through an international organ with supranational power.[216]

Following this idea that norms can only derive from other norms, the conclusion drawn would have to be that any national law is derived from EU law, and EU and national law derive from international law. This, however, is an argument that does not reflect reality.[217] Indeed, the CJEU famously postulated the "autonomy of the Community legal order"[218] and introduced the "direct effect"[219] of EU law, which has been interpreted by some as a monistic approach.[220] Nevertheless, even for the most progressive EU constitutional lawyers it would be a step too far to argue that all Member State legal orders derive from EU law. Without the backup of the epistemological necessity of such claims, the postulation of such a chain of validity is exposed as the Emperor's new clothes: "But he has not got anything on!"[221]

The fatal blow for monism with regard to EU law is the relationship between EU law and international law, which appears to show even dualistic

[215] Verdross (n 214) 35 [translated by the author].

[216] Verdross (n 214) 48 ff. But see Krabbe (n 17) 305–309. For a more recent account taking sociological, ethical and political science perspectives into account, see Andreas L Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (CH Beck 2001). Also see Andreas L Paulus, "The Emergence of the International Community and the Divide between International and Domestic Law" in Janne E Nijman and André Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007) 216–250 (216), diagnosing that national courts consider international law not as a superior authority, but regard it "as formal authority only in the instance domestic law renders it binding for the court in question."

[217] For criticism of the other monistic concept with the primacy of national law (which would consequently make international and supranational law governed by almost 200 diverging national laws), see n 206. Cf Kirchmair (n 205) 681 n 12.

[218] Case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66; Case C-284/16 *Slovak Republic v Achmea BV* ECLI:EU:C:2018:158 para 33.

[219] Case-26/62 *Van Gend & Loos v Netherlands* ECLI:EU:C:1963:1.

[220] Kirchmair (n 205) 680 with further references in n 10.

[221] Hans Christian Andersen, "Des Kaisers neue Kleider" in Hans Christian Andersen (ed) *Gesammelte Märchen* I (Carl B Lorck 1847) 37–44 (43), "Aber er hat ja nichts an!" available at https://andersen.sdu.dk/vaerk/hersholt/TheEmperorsNewClothes_e.html [last accessed February 1, 2023].

elements.[222] This "Janus face" is a challenge for the unifying concept of Kelsenian monism – at least when trying to uphold its underlying assumptions to explain this reality. Hence, also concerning the relationship between international and EU law, Kelsenian monism faces a reality that challenges its theoretical assumptions. How can the relationship between international and EU law be explained as a unity by Kelsenian monism if the CJEU clearly conceives these two legal orders as being separate? Again, without the epistemological necessity of Kelsenian monism, this postulation becomes utterly fictitious and therefore is not a superior explanation of the relationship.[223]

1.3 WHY DUALISM AND KELSENIAN MONISM DO NOT RESOLVE THE QUESTION OF WHO HAS THE FINAL SAY

While it is important to consider the current dichotomy of legal sources of international, EU and national law, a common normative framework is equally important. Such a framework is necessary to acknowledge the entanglements of these three legal orders and to enable a solution to the norm conflicts arising from this entanglement. Hence, the changes in the legal landscape force us to leave behind the almost 100-year-old theories of monism and dualism. Major developments force us to seek an adequate theoretical framework that fits the reality of our time.

The main claims of dualism and monism are summarized in Table 1.1.

[222] Compare specifically Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461 para 125 defining UN law and EU law as "integrated but separate legal orders." Cf Kirchmair (n 205) 683–685 with further references.

[223] Compare in this regard also Friedrich Lohmann, "'Ethische Unruhe.' Die Funktion von Ethik bei der gesellschaftlichen Ordnungsbildung" in Helga Pelizäus and Ludwig Nieder (eds) *Das Risiko – Gedanken übers und ins Ungewisse. Interdisziplinäre Aushandlungen des Risikophänomens im Lichte der Reflexiven Moderne. Eine Festschrift für Wolgang Bonß* (Springer 2019) 95–125 (99–100), stating that the Kelsenian conception of normativity with the basic norm on top aims at achieving objectivity, order and clarity; however, the basic norm cannot fulfil this purpose. Rather, this seems to be like a rope out at sea which is grasped by somebody who has been shipwrecked in order to avoid drowning.

TABLE 1.1 *Overview of dualism as well as Kelsenian and Verdrossian monism*

	Dualism	Kelsenian monism	Verdrossian monism
Presuppositions	International and national law have: - different addressees; - different content (international law is purely inter-State law); - different sources.	- (neo-)Kantian epistemology ("manner of cognizance constitutes the object"). - Hypothetical unity – being kept together by the "chain of validity" and norms can only derive from other norms. - Norm conflict between "different systems of norms" is construed as a legal epistemological impossibility.	- Values based in natural law. - International basic norm: *pacta sunt servanda*.
Theoretical outcome	International and national legal orders are: - separated ("two circles, which possibly touch, but never cross each other," Triepel); - based on different grounds of validity.	- If international law is law, the logical consequence is that national, EU and international law must be seen as a unitary legal order. - Either international/EU law derives from national law or national law derives from international/EU law.	- "Unity of the legal world order"; - Municipal law derives from this international basic norm; - Lawmakers of public international law are not States, but the international community, acting through an international organ with supranational power.
Legal consequences	- Norms must be incorporated from one legal order into another. - The legal subjectivity of international organizations (be it the UN or the EU) would have one international and *x*-national ground of validity.	- Chain of validity (*Stufenbau nach der rechtlichen Bedingtheit*). - Ultimate ground of validity is the famous basic norm (*Grundnorm*). - If national law conflicts with international law, Kelsen earlier argued that national law is null and void whereas he later held that national law is voidable.	- Ultimate ground of validity is also the basic norm, which, however, is based on natural law. - If national law conflicts with international law, national law is voidable.
Failure	- Presuppositions outdated.	- Remains a theory focused on epistemology which does not hold its promise. - Norm conflict solution is highly hypothetical.	- Value-laden theory based on natural law. - Unity of the legal world order is highly fictitious.